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Supreme Court, U.S.
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No. 10-___

IN THE
Supreme Court of the United States

KAISER EAGLE MOUNTAIN, INC., AND
MINE RECLAMATION CORPORATION,

Petitioners,

v.

NATIONAL PARKS & CONSERVATION
ASSOCIATION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A
Ninth Circuit Opinion

United States Court of Appeals,
Ninth Circuit.

NATIONAL PARKS & CONSERVATION ASSOCIATION, Plaintiff-Appellee,
v.
BUREAU OF LAND MANAGEMENT; United States Department of Interior, Defendants,
and
Kaiser Eagle Mountain, Inc.; Mine Reclamation Corporation, Defendants-Appellants.
Donna Charpied; Laurence Charpied; Desert Protection Society; Center for Community Action and Environmental Justice, Plaintiffs-Appellees,
v.

United States Department of Interior, Defendant, Bureau of Land Management; National Park Service; Bruce Babbitt, in his official capacity as Secretary of the Interior; Tom Fry, in his official capacity as Acting Director of the Bureau of Land Management; Al Wright, in his official capacity as Acting California State Director of the Bureau of Land Management; Tim Salt, in his official capacity as Bureau of Land Management California Desert District Manager; Robert Stanton, in his official capacity as Director of the National Park Service, Defendants,
and
Kaiser Eagle Mountain, Inc.; Mine Reclamation Corporation, Defendants-Appellants.
National Parks & Conservation Association, Plaintiff-Appellee,

v.

United States Department of Interior, Defendant-Appellant,
Bureau of Land Management, Defendant-Appellant,
and
Kaiser Eagle Mountain, Inc.; Mine Reclamation Corporation, Defendants.

Donna Charpied; Laurence Charpied; Desert Protection Society; Center for Community Action and Environmental Justice, Plaintiffs-Appellants,

v.

United States Department of Interior; Kaiser Eagle Mountain Inc.; Mine Reclamation Corporation; Bureau of Land Management; National Park Service; Bruce Babbitt, in his official capacity as Secretary of the Interior; Tom Fry, in his official capacity as Acting Director of the Bureau of Land Management; Al Wright, in his official capacity as Acting California State Director of the Bureau of Land Management; Tim Salt, in his official capacity as Bureau of Land Management California Desert District Manager; Robert Stanton, in his official capacity as Director of the National Park Service, Defendants-Appellees.

Nos. 05-56814, 05-56815, 05-56843, 05-56832, 05-56908.

Argued and Submitted Dec. 6, 2007.
Filed Nov. 10, 2009.
Amended May 19, 2010.

Appeal from the United States District Court for the Central District of California, Robert J. Timlin, District Judge, Presiding. D.C. Nos. CV-00-00041-RT, CV-99-00454-RT.

Before: HARRY PREGERSON, STEPHEN S. TROTT and RICHARD A. PAEZ, Circuit Judges.

Opinion by Judge PREGERSON; Dissent by Judge TROTT.

ORDER

The opinion filed on November 11, 2009 is amended as follows:

Slip opinion at page 15123 [586 F.3d 735, 747-48], first paragraph, line 7, delete portion of paragraph beginning "Furthermore" and concluding at the end of the paragraph with " *Id.*" Insert footnote at line 7, at the conclusion of the revised paragraph. The footnote shall read:

> DOI's current NEPA guidelines take the exact *opposite* approach to that of the Corps regulations in *Angoon*. DOI's NEPA handbook explains that the "purpose and need statement for an externally generated action must describe the BLM purpose and need, *not an applicant's or external proponent's purpose and need*." Department of Interior, Bureau of Land Management, National Environmental Policy Act Handbook 35, (citing 40 C.F.R. § 1502.13) (emphasis added), *available at* http:// www. blm. gov/ pgdata/ etc/ medialib/ blm/ wo/ Information_ Resources_ Management/ policy/ blm_ handbook. Par. 24487. File. dat/h1790-1-2008-1.pdf (citing 40 C.F.R. § 1502.13) (emphasis added). "The applicant's purpose

> and need may provide useful background information, but this description must not be confused with the BLM purpose and need for action.... It is the BLM purpose and need for action that will dictate the range of alternatives...." *Id.*

Slip opinion at page 15124 [586 F.3d at 748], line 4, delete the sentence beginning "That the BLM does not...." Replace with "Kaiser may desire to find a viable use for mine by-products located on its private land holdings, but the BLM has no need to do so."

Slip opinion at page 15125 [586 F.3d at 748], delete the final sentence of footnote 9.

All pending amicus motions are **GRANTED.** All petitions for panel rehearing and rehearing en banc remain pending.

OPINION

PREGERSON, Circuit Judge:

Kaiser Eagle Mountain, Inc. ("Kaiser") seeks to build a landfill on a former Kaiser mining site near Joshua Tree National Park ("Joshua Tree"). As part of its landfill development plan, Kaiser sought to exchange certain private lands for several parcels of land surrounding the mine site and owned by the Bureau of Land Management ("BLM"). Several parties, including the National Parks Conservation Association ("Conservation Association") and Donna and Laurence Charpied ("the Charpieds"), challenged the land exchange. Nevertheless, the BLM approved

the land exchange, as did the Interior Board of Land Appeals ("Appeals Board").

The Conservation Association and the Charpieds pursued challenges in district court on several grounds, including violations of the Federal Land and Policy Management Act ("Management Act") and National Environmental Policy Act ("NEPA"). The district court held for the Conservation Association and Charpieds on the Management Act claims and some, but not all, of the NEPA claims. We have jurisdiction under 28 U.S.C. § 1291 and affirm in part and reverse in part.

I. Background

Kaiser owned and operated an iron ore mine near the Eagle Mountain range in Riverside County, California from 1948 to 1983. The mine area covered over 5,000 acres and included four large open pits. The mine area also included a 429-acre "Townsite," which housed mine workers and support personnel, and over which the United States owns a reversionary interest. Though Kaiser currently leases the Townsite for use as a correctional facility, the majority of the mine site lies dormant. The disturbed lands, which contain large quantities of mine tailings, have not been reclaimed.

The BLM owns several parcels of land surrounding the former mine site. In 1989, Kaiser sought to acquire these parcels through a land exchange. Under Kaiser's proposal, Kaiser will acquire 3,481 acres of public land, the United States's reversionary interest in the Townsite, and permanent

rights-of-way over the dormant Eagle Mountain Railroad and Eagle Mountain Road. In exchange, Kaiser offered 2,846 acres of private land near other BLM lands and within an area designated as critical habitat for the desert tortoise.

Kaiser's ultimate goal is to develop the largest landfill in the United States. The proposed landfill project will cover 4,654 acres, including support and "buffer" areas. The landfill will accept solid wastes from several Southern California communities. The majority of the waste will be transported by train, though there will also be some truck and "self-haul" loads. The project is designed to operate for 117 years. At its peak, the proposed landfill will accept 20,000 tons of garbage per day, six days a week, for up to sixteen hours per day. During the final phase of the project, to commence in roughly seventy-eight years, garbage will be deposited into the largest of the four open mining pits, the East Pit. The remaining pits will not be filled. The total capacity of the proposed landfill is approximately 708 million tons.

Both Joshua Tree and the Kaiser mine site lie within a large desert wilderness area that is home to several sensitive plant and animal species, including the desert tortoise and Bighorn sheep. The proposed landfill site sits within one and-a-half miles of Joshua Tree. The landfill would be visible from remote areas of Joshua Tree.

As part of its analysis of the proposed land exchange, the BLM produced a Draft Environmental Impact Statement ("EIS"). The EIS described the

purpose and need of the project as follows:

> The primary purpose of the Project is to develop a new Class III nonhazardous municipal solid waste landfill to meet the projected long-term demand for environmentally sound landfill capacity in Southern California; provide a long-term income source from the development of a nonhazardous municipal solid waste landfill; find an economically viable use for the existing mining by-products at the Kaiser Eagle Mountain Mine site, including use of existing aggregate and overburden; and provide long-term land use and development goals and guidance for the Townsite.

With these purposes in mind, the BLM considered six alternatives in detail: (1) No action; (2) Reduced volume of waste; (3) Alternate road access; (4) Rail access only; (5) Landfill on Kaiser land only; and (6) Landfill development without Townsite development.

The BLM also commissioned an appraisal report on the proposed exchange lands from David J. Yerke, Inc. ("the Yerke appraisal"). The Yerke appraisal found that the "highest and best use" of the public lands in question was "holding for speculative investment." The appraisal explicitly stated that it did "not take into consideration any aspects of the proposed landfill project." The Yerke appraisal therefore valued the public parcels surrounding the

mine site at roughly $77 per acre and the Townsite at roughly $106 per acre.[1]The appraisal valued the Kaiser lands to be exchanged at approximately $104 per acre. The BLM subsequently required Kaiser to pay $20,100, the difference between the value of the exchanged public lands and Kaiser's parcels.

In 1997, the BLM adopted a Final EIS, incorporating the Draft EIS, and issued a Record of Decision approving the land exchange as proposed by Kaiser. The Conservation Association and Charpieds filed administrative protests with the BLM. When those protests were denied, the Conservation Association and Charpieds separately appealed to the Appeals Board. The Appeals Board affirmed the BLM's decision in a separate decision, incorporating the Draft and Final EIS, in September 1999.

The Conservation Association and the Charpieds (hereinafter, collectively "Conservation Association") filed separate complaints in the district court seeking review under the Administrative Procedure Act and alleging violations of the Management Act and NEPA. The district court consolidated the complaints. On cross-motions for summary judgment, the district court ruled in the Conservation Association's favor, in part. Looking only to the Record of Decision, the district court set aside the land exchange because: (1) the BLM did not give "full consideration" to whether the land exchange is in the

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[1] The Los Angeles County Sanitation District has since entered into a conditional agreement to purchase the landfill property and permits for over $8,800 per acre.

public interest; (2) the Yerke appraisal failed to consider a landfill as a "highest and best use"; (3) the EIS's "purpose and need" statement was too narrowly drawn, with accordingly narrow potential alternatives foreordaining landfill development; and (4) the BLM failed to take a "**hard look**" at potential impacts on Bighorn sheep and the effects of nitrogen enrichment on the nutrient-poor desert environment. This appeal followed.

II. Standard of Review

We review a grant or denial of summary judgment de novo. *Northwest Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1132 (9th Cir.2006). We may only overturn agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Great Basin Mine Watch v. Hankins,* 456 F.3d 955, 961-62 (9th Cir.2006); 5 U.S.C. § 706(2)(A).

III. Scope of Review

As a preliminary matter, we must first identify the agency action under our review. The Conservation Association argues, as the district court held, that the Record of Decision constitutes final agency action. We disagree.

Under the Administrative Procedure Act, only "final agency action" is subject to judicial review. 5 U.S.C. § 704. The BLM is part of the Department of the Interior ("DOI"). DOI regulations state that, barring a petition for a stay, a decision will become effective upon the expiration of the appeal period. 43

C.F.R. § 4.21(a)(2). If an Appeals Board fails to act upon a petition for a stay or denies such a petition, the decision becomes effective immediately. 43 C.F.R. § 4.21(a)(3). The Appeals Board's decisions, in contrast, constitute final agency action when made. "The Board [of Land Appeals] decides finally for the Department [of Interior] appeals to the head of the Department from decisions rendered by Departmental officials relating to ... [t]he use and disposition of public lands...." 43 C.F.R. § 4.1(b)(3)(i). "A decision of the Board shall constitute final agency action and be effective upon the date of issuance, unless the decision itself provides otherwise." 43 C.F.R. § 4.403.[2]

In the case before us, the Record of Decision never became effective, and cannot serve as the agency's final action. The language of the Administrative Procedure Act does not support the Conservation Association's arguments. "[A]gency action otherwise final is final ... whether or not there has been presented or determined an application for ... any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority." 5 U.S.C. § 704. The Conservation Association contends that no rule renders the Record of Decision inoperative during the

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[2] The Conservation Association argues that 43 C.F.R. § 4.403 applies only to Appeals Board actions, and does nothing to rob the Record of Decision of its finality. Taken to its logical conclusion, this argument would allow for two independent, and potentially conflicting, "final" agency actions. This cannot be.

pendency of the appeal, and therefore the Record of Decision is a final action. This court has held, however, that "exercise of an optional appeal to a Department ALJ renders the initial Administrator's decision nonfinal for purposes of judicial review under the APA." *Acura of Bellevue v. Reich,* 90 F.3d 1403, 1407 (9th Cir.1996). Furthermore, the Conservation Association's argument ignores the "otherwise final" language of the Administrative Procedure Act. DOI rules need not explicitly render the Record of Decision inoperative because, in a case such as that before us, the decision was never effective in the first instance. [3]

We note that in some cases, a Record of Decision may constitute final agency action. For example, where there is no administrative appeal, a Record of Decision will become effective and final following the expiration of the appeal period, in accordance with 43 C.F.R. § 4.21(a)(2). Similarly, where the Appeals

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[3] Contrary to Kaiser's suggestion, our holding is not compelled by 43 C.F.R. § 4.21(c). § 4.21(c) states:

> No decision which at the time of its rendition is subject to appeal to the Director or an Appeals Board shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. 704, unless a petition for a stay of decision has been timely filed *and* the decision being appealed has been made effective ....

(Emphasis added). This subsection deals with exhaustion of administrative remedies, not finality of agency action. If taken, as Kaiser suggests, to touch upon finality of agency action, § 4.21(c)'s requirement that a petition for stay be timely filed would render all actions *not* subject to a petition for stay non-final, and thus unreviewable.

Board denies a petition for a stay, a Record of Decision will become effective and final in accordance with 43 C.F.R. § 4.21(a)(3). Indeed, this was the situation in *Desert Citizens Against Pollution v. Bisson,* 231 F.3d 1172 (9th Cir.2000). There, the Appeals Board *denied* a petition for a stay. *Id.* at 1175. This court therefore reviewed the Record of Decision as the final agency action. *See, e.g., id.* at 1182. In the case before us, in contrast, the Appeals Board *granted* a stay. The Record of Decision therefore never became effective and was not the final agency action. We reverse the district court to the extent that it limited its review to the Record of Decision. The Appeals Board decision, which incorporated the Environmental Impact Statement, is the final agency action before us for review.

IV. Federal Land and Policy Management Act Claims

Kaiser and the BLM appeal the district court's determinations that the Yerke appraisal was inadequate and that the BLM failed to give "full consideration" to whether the land exchange well serves the public interest.

A. Highest and Best Use

1. Exhaustion of Administrative Remedies

In district court, the Conservation Association challenged the BLM's appraisal of the exchange lands on the ground that the BLM failed to consider a landfill as the "highest and best use" of the public parcels. Kaiser and the BLM argue, as they did

before the district court, that the Conservation Association failed to exhaust this issue before the Appeals Board, and that this court should not review the highest and best use claim.

"As a general rule, we will not consider issues not presented before an administrative proceeding at the appropriate time." *Marathon Oil Co. v. United States,* 807 F.2d 759, 767-68 (9th Cir.1986). However, we have repeatedly held that the exhaustion requirement should be interpreted broadly. Plaintiffs fulfill the requirement if their appeal "provided sufficient notice to the [agency] to afford it the opportunity to rectify the violations that the plaintiffs alleged." *Native Ecosystems v. Dombeck,* 304 F.3d 886, 899 (9th Cir.2002). Plaintiffs need not state their claims in precise legal terms, and need only raise an issue "with sufficient clarity to allow the decision maker to understand and rule on the issue raised, but there is no bright-line standard as to when this requirement has been met." *Great Basin Mine Watch v. Hankins,* 456 F.3d at 968 (internal quotation omitted).

In the case before us, we are satisfied that the Appeals Board received sufficient notice to allow the agency to respond to the highest and best use issue. Although the Conservation Association did not use the words "highest and best use," its Statement of Reasons for appeal to the Appeals Board stated:

> THE BLM WILL NOT RECEIVE FAIR MARKET VALUE FOR THE EXCHANGE. Any disposal of federal lands must be compensated at "fair market value of the use

> of public lands and their resources." 43 U.S.C.A. § 1701(a).... Kaiser will also pay BLM a lump sum of $20,100, which is below the *fair market value.* Kaiser anticipates huge profits *from a landfill operation* on the undervalued BLM land. . . .

(emphasis added). In their separate Statement of Reasons, the Charpieds argued that "the public should receive fair appraisal for its lands," and "[n]ot an appraisal that has been artificially reduced in value through instructions to discount developments, improvements, and recent zoning changes."

These statements adequately raised the highest and best use issue before the Appeals Board.[4] The Yerke appraisal explicitly states that it does not consider any aspect of the landfill project. The Conservation Association's Statement of Reasons highlighted the BLM's failure to appraise the land's fair market value *as a landfill.* The highest and best use analysis is an integral part of the appraisal process. 43 C.F.R. § 2201.3-2(a)(1) ("In estimating

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[4] The dissent finds language such as "appraisers failed to consider that the Federal land to be exchanged is proposed to be used as a landfill, and that, as a result, the land should be valued ... in comparison to landfill sites" satisfactory to exhaust the highest and best use issue. Dissent at 1096 (quoting *Donna Charpied,* 137 IBLA 45, 47 (1996)). We see no meaningful distinction between this language and that presented in the case before us, which highlights that Kaiser will reap profits "from a landfill operation," will pay "below the fair market value," and that the appraisal unfairly ignored development and zoning changes.

market value, the appraiser shall: (1) Determine the highest and best use of the property to be appraised[.]"). Under such a backdrop, the Appeals Board had sufficient notice to address the highest and best use issue.

2. Merits of the Highest and Best Use Claim

The statutory and regulatory requirements governing appraisals are numerous. The Management Act requires the BLM to appraise lands before agreeing to a land exchange. 43 U.S.C. § 1716(d)(1). This appraisal must set forth an opinion regarding the market value of the lands "supported by the presentation and analysis of relevant market information." 43 C.F.R. § 2200.0-5(c). Market value "means the most probable price ... that lands or interests in lands should bring in a competitive and open market ... where the buyer and seller each acts prudently and knowledgeably." 43 C.F.R. § 2200.0-5(n). "In estimating market value, the appraiser shall: (1) Determine the highest and best use of the property to be appraised"; and "(2) Estimate the value of the lands and interests as if in private ownership and available for sale in the open market." 43 C.F.R. § 2201.3-2(a)(1)-(2). "Highest and best use means the most probable legal use of a property, based on market evidence as of the date of valuation, expressed in an appraiser's supported opinion." 43 C.F.R. § 2200.0-5(k).

The appraisal must also comply, to the extent appropriate, with the separate requirements of the Uniform Appraisal Standards for Federal Land Acquisitions. 43 C.F.R. § 2201.3. Under the Uniform

Appraisal Standards definition, highest and best use is " '[t]he highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future.' " The Appraisal Institute, Uniform Appraisal Standards for Federal Land Acquisitions 34 (quoting *Olson v. United States,* 292 U.S. 246, 255, 54 S.Ct. 704, 78 L.Ed. 1236 (1934)), *available at* http:// www. usdoj. gov/enrd/land-ack/yb2001.pdf. While Department of Interior regulations define highest and best use as the "most probable" use of land, the Uniform Standards only require "reasonable probability" of a given use. Uniform Standards at 34; *Desert Citizens,* 231 F.3d at 1181 n. 10. Under the Uniform Standards, the highest and best use must also be: (1) physically possible; (2) legally permissible; (3) financially feasible; and (4) must result in the highest value. Uniform Standards at 17.

In *Desert Citizens,* we examined a highest and best use claim almost identical to that presented in the instant case. *Desert Citizens,* 231 F.3d at 1175, 1180. In *Desert Citizens,* a mine operator proposed a land exchange to the BLM in connection with the development of the Mesquite Regional Landfill on and near the Mesquite Mine. *Id.* at 1175. An appraisal of the public lands concluded that the highest and best use was "open space" or "mine support." *Id.* At the time of the appraisal, the mine operator had already applied for county permits to build the landfill. *Id.* The district court upheld the appraisal on the grounds that there was no market demand for a landfill and that landfill development was an expensive, risky venture. *Id.* at 1180.

We reversed. After analyzing the statutory and regulatory framework regarding highest and best use, we held that "uses that are reasonably probable must be analyzed as a necessary part of the highest and best use determination. This analysis must have due regard for the existing business or wants of the community, or such needs as may be reasonably expected to develop in the near future." *Id.* at 1181 (internal quotations and citations omitted). We observed that because the lands in question "were expected to be used for landfill purposes" and because the "existence of other landfill proposals in the region indicated a general market for landfill development," landfill use was reasonably probable and must "*at the very least* " have been considered in the highest and best use analysis. *Id.* (emphasis added).

We then proceeded to analyze the physical, legal, and financial feasibility of the proposed Mesquite Landfill, in accordance with the Uniform Appraisal Standards. *Id.* at 1184. In our discussion of financial feasibility, we held that "a regional market and the presence of competitors sponsoring similar projects made reasonably probable, prior to the ... appraisal, that use of the lands for landfill purposes was financially feasible." *Id.* at 1185. Among the other landfill proposals we relied upon as evidence of market demand was the "Eagle Mountain Regional Landfill proposed by Kaiser." *Id.*

The facts of *Desert Citizens* are virtually identical to the facts before us in the instant case. Kaiser applied for county permits before the Yerke appraisal was drafted. The Yerke appraisal was clearly cognizant of Kaiser's proposal, yet explicitly stated

that it was not taking "into consideration any aspect of the proposed landfill project." Kaiser and the BLM do not contest the physical or legal feasibility of constructing a landfill at the Eagle Mountain site. As for financial feasibility, we held in *Desert Citizens* that the presence of competing proposals alone is sufficient to establish market demand and financial feasibility. *Id.* If the Kaiser landfill proposal was sufficient to establish a reasonable probability of the Mesquite Landfill's financial feasibility, the Mesquite Landfill and other proposals must demonstrate similar feasibility of the Kaiser project.

The BLM tries to distinguish *Desert Citizens* by arguing that here, BLM market analyses did not show that there were other landfill proposals in the area, and therefore there is no evidence of market demand. This argument distorts the facts of *Desert Citizens* and misses the point entirely. Contrary to the BLM's assertions, in *Desert Citizens* we did not look to the BLM's own market analyses for proof of market demand. To the contrary, the BLM's position, as articulated by the district court, was that market demand did not exist. *Id.* at 1180. In reversing this determination, we looked not to any BLM market analysis, but rather to the obvious and well-known presence of competing landfill proposals. *Id.* at 1185. Indeed, we found the appraiser's willful ignorance of facts of "general notoriety" "particularly troubling." *Id.* at 1182.

Kaiser and the BLM have failed to distinguish

the facts of this case from those of *Desert Citizens*.[5]

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[5] Kaiser and the BLM rely heavily on a 2002 report compiled by the Herzog Group as part of the litigation of this case. This report was not before either the BLM or the Appeals Board. Accordingly, we do not consider it here. *See, e.g., Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir.2006) ("Parties may not use post-decision information as a new rationalization either for sustaining or attacking the Agency's decision." (internal quotation omitted)).

The dissent erroneously concludes that the Herzog "appraisal" cured any deficiency in the Yerke appraisal, and that we should therefore consider the Herzog report under our decision in Friends of the Clearwater v. Dombeck, 222 F.3d 552 (9th Cir.2000). Dissent at 1098-99. In Dombeck, we considered supplemental materials presented after the onset of litigation where a remand would be pointless because a court "could not order the [agency] to conduct studies already completed to answer questions the [agency] already answered on a basis that could not be successfully challenged." Id. at 560 (internal quotation omitted). Kaiser argues that (1) the Herzog report did consider highest and best use, as required by our decision in Desert Citizens, (2) the BLM has rendered a final decision accepting the Herzog analysis, and (3) the Conservation Association failed to appeal that "decision."

First, we note that Dombeck concerned a NEPA violation, whereas here we examine a Management Act violation. Dombeck also specifically distinguished suits to compel agency action from challenges, such as that before us here, to a final agency action. Regardless of these distinctions, Dombeck is inapplicable because the record does not demonstrate that the BLM has cured the defects of the Yerke appraisal on a basis that is immune to challenge. Kaiser points to, and the dissent apparently relies upon, a letter from a BLM district manager to the State Director in which the district manager favorably references the Herzog report in the course of reiterating that the land exchange well serves the public interest. This letter hardly establishes that the BLM has cured the Management Act deficiencies of the Yerke appraisal "on a basis that could not be

As such, the highest and best use analysis should have taken the reasonably probable use of public lands for a landfill into consideration as part of the highest and best use analysis. As we stated in *Desert Citizens:*

> [T]he use of the land as a landfill was not only reasonable, it was the specific intent of the exchange that it be used for that purpose. There is no principled reason why the BLM, or any federal agency, should remain willfully blind to the value of federal lands by acting contrary to the most elementary principles of real estate transactions.

231 F.3d at 1184. We therefore affirm the district court's grant of summary judgment on the highest and best use claim under the Management Act.

B. The Public Interest Determination

Under the Federal Land Policy and Management Act, the BLM must determine that "the public interest will be well served" by a land exchange before approving such an exchange. 43 U.S.C. § 1716(a); *see also* 43 C.F.R. § 2200.0-6(b). This determination "shall give full consideration to better

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successfully challenged." There is nothing in the record to indicate that the BLM has rendered a final, appealable decision on an appraisal that properly considers landfill use as a highest and best use. Dombeck therefore does not apply, and we do not consider the 2002 Herzog report.

Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas ... and fish and wildlife ...." 43 U.S.C. § 1716(a). A determination that an exchange well-serves the public interest must be predicated on a finding that:

> (1) The resource values and the public objectives that the Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the resource values of the non-Federal lands or interests and the public objectives they could serve if acquired,[6] and (2) The intended use of the conveyed Federal lands will not, in the determination of the authorized officer, significantly conflict with established management objectives on adjacent Federal lands and Indian trust lands. Such finding and the supporting rationale shall be made part of the administrative record.

43 C.F.R. § 2200.0-6(b).

The Management Act does not define the term "full consideration." Our review is thus limited to the question whether the BLM's interpretation of the term is based on a permissible construction of the statute. *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council,* 467 U.S. 837, 843, 104 S.Ct. 2778, 81

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[6] In other words, the BLM must find that the resource values of the public land being conveyed do not outweigh the resource values of the private land being acquired.

L.Ed.2d 694 (1984). We review the entire record to determine whether the agency's decision was based on a reasonable consideration of the relevant factors. *Hjelvik v. Babbitt,* 198 F.3d 1072, 1074 (9th Cir. 1999).

The district court's analysis was constrained by its decision to review only the Record of Decision. Having held that the Appeals Board's decision, which incorporates the EIS, is the final agency action under review, we examine a broader set of materials than did the district court. The Final EIS alone includes over 1,600 pages of material not considered by the district court, including detailed environmental analyses. Though we do not necessarily agree with the BLM's public interest determination, the record as a whole establishes that the BLM's interpretation of "full consideration," as evinced by the analyses in the EIS, is permissible under 43 U.S.C. § 1716(a).[7] Accordingly, we reverse the district court's determination on this issue.

V. National Environmental Policy Act Claims

The National Environmental Policy Act requires federal agencies to prepare an Environmental Impact Statement discussing, among other things, the environmental impact of a proposed action, any

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[7] In agreeing with this conclusion, the dissent quotes several examples of these sufficient Management Act public interest analyses, albeit in the context of a separate "purpose and need" issue under the National Environmental Policy Act. Dissent at 1079-84.

adverse environmental effects which cannot be avoided, and alternatives to the proposed action. 42 U.S.C. § 4332(2)(C). In addition, implementing regulations require that the agency state the underlying purpose and need for the proposed action. 40 C.F.R. § 1502.13. Kaiser and the BLM appeal the district court's holding that the EIS was deficient with respect to purpose and need, reasonable alternatives, impacts on Bighorn sheep, and eutrophication.[8]

A. Purpose and Need and Reasonable Alternatives

Agencies enjoy "considerable discretion" to define the purpose and need of a project. *Friends of Southeast's Future v. Morrison,* 153 F.3d 1059, 1066 (9th Cir.1998). However, "an agency cannot define its objectives in unreasonably narrow terms." *City of Carmel-By-The-Sea v. United States Dep't. of Transp.,* 123 F.3d 1142, 1155 (9th Cir.1997). As the *Friends* court stated, "An agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." *Friends,* 153 F.3d at 1066 (quoting *Citizens Against Burlington, Inc. v. Busey,* 938 F.2d 190, 196

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[8] Eutrophication, in this context, refers to the introduction of nutrients to the desert environment. The eutrophication discussion in this case focuses on two potential pathways: (1) landfill waste material; and (2) nitrogenbearing airborne emissions.

(D.C.Cir.1991), *cert. denied,* 502 U.S. 994, 112 S.Ct. 616, 116 L.Ed.2d 638 (1991)) (correction in original). We evaluate an agency's statement of purpose under a reasonableness standard. *Id.* at 1066-67.

In the case before us, the purpose and need statement reads:

> The primary purpose of the Project is to develop a new Class III nonhazardous municipal solid waste landfill to meet the projected long-term demand for environmentally sound landfill capacity in Southern California; provide a long-term income source from the development of a nonhazardous municipal solid waste landfill; find an economically viable use for the existing by-products at the Kaiser Eagle Mountain Mine site, including use of existing aggregate and overburden; and provide long-term land use and development goals and guidance for the Townsite.

The Conservation Association contends, and the BLM does not dispute, that the majority of these purposes and needs respond to Kaiser's goals, not those of the BLM. Other circuits have held that agencies must acknowledge private goals. *Colorado Envtl. Coalition v. Dombeck,* 185 F.3d 1162, 1175 (10th Cir.1999) ("Agencies ... are precluded from completely ignoring a private applicant's objectives."); *Burlington,* 938 F.2d at 196 ("[T]he agency should take into account the needs and goals of the parties involved in the application."). Requiring agencies to consider private objectives, however, is a far cry from

mandating that those private interests define the scope of the proposed project. Instead, as the *Burlington* court held:

> [A]gencies must look hard at the factors relevant to the definition of purpose.... Perhaps more importantly [than the need to take private interests into account], an agency should always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as in other congressional directives.

Id. We agree.

Burlington does not conflict with our decision in *City of Angoon v. Hodel*, 803 F.2d 1016 (9th Cir.1986). In *Angoon*, a private party sought a federal permit to build a log-transfer facility on its own lands. *Id.* at 1019. As part of an EIS, the Army Corps of Engineers ("the Corps") identified a purpose and need to provide a "safe, cost effective means of transferring timber harvested on [the privately owned] land." *Id.* at 1021. The district court eliminated the private land specification, and restated the purpose and need as "commercial timber harvesting." *Id.* We reversed, rejecting the district court's "broad social interest" formulation in favor of the Corps's "more balanced" statement. *Id.*

Angoon is distinguishable from the situation in the case before us. In *Angoon*, the issue was whether the Corps should issue a permit. *Id.* at 1017-18. As discussed above, agencies must look hard at the

factors relevant to definition of purpose. In *Angoon*, those factors included a regulatory framework far different from that guiding the BLM here. The relevant Corps regulations in *Angoon* explicitly stated that "every application has both an applicant's purpose and need and a public purpose and need" and specified that a Corps EIS must document alternatives "which would satisfy the purpose and need ... *for which the applicant has submitted his proposal*." *Id.* at 1021 (citing 33 C.F.R. pt. 230, App. B(11)(b)(4)-(5) (1985) (emphasis added)). We therefore held that the Corps's purpose and need statement, which emphasized private goals, reasonably balanced the relevant factors. *Id.*

In contrast, the Department of Interior has promulgated no regulations emphasizing the primacy of private interests. The DOI analogue to the Corps's regulation, 40 C.F.R. § 1502.13, merely requires that an EIS "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." Furthermore, DOI's current NEPA guidelines take the exact opposite approach to that of the Corps regulations in *Angoon*. DOI's NEPA handbook explains that the "purpose and need statement for an externally generated action must describe the BLM purpose and need, *not an applicant's or external proponent's purpose and need*." Department of Interior, Bureau of Land Management, National Environmental Policy Act Handbook 35, (citing 40 C.F.R. § 1502.13) (emphasis added), available at http:// www. blm. gov/ pgdata/ etc/ medialib/ blm/ wo/ Information_ Resources_ Management/ policy/blm_ handbook. Par. 24487. File. dat/ h1790-1-2008-1.pdf

(citing 40 C.F.R. § 1502.13) (emphasis added). "The applicant's purpose and need may provide useful background information, but this description must not be confused with the BLM purpose and need for action.... It is the BLM purpose and need for action that will dictate the range of alternatives...." *Id.*

The BLM's definition of the project's purpose will necessarily affect the range of alternatives considered, because when "the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved." *Angoon,* 803 F.2d at 1021. Our task is to determine whether the BLM's purpose and need statement properly states the BLM's purpose and need, against the background of a private need, in a manner broad enough to allow consideration of a reasonable range of alternatives. In the case before us, the purpose and need statement sets out four goals: (1) to meet long-term landfill demand; (2) to provide a longterm income source from a landfill; (3) to find a viable use for mine byproducts; and (4) to develop long-term development plans for the Townsite. The first, to meet long-term landfill demand, is unquestionably a valid BLM purpose. The remaining three goals, however, can hardly be characterized as BLM needs. Kaiser and its successors in interest, not the BLM, will be the recipient of any long-term income from the landfill. Kaiser may desire to find a viable use for mine by-products located on its private land holdings, but the BLM has no need to do so. Kaiser, not the BLM, currently operates the Townsite, in which it stands to receive a fee interest, and would be the beneficiary of any long-term development plans.

The purpose and need statement, though it includes one BLM goal, also sets out three private objectives as defining characteristics of the proposed project. Such a narrowly drawn statement necessarily and unreasonably constrains the possible range of alternatives. The BLM considered only six alternatives in detail: (1) No action; (2) Reduced volume of waste; (3) Alternate road access; (4) Rail access only; (5) Landfill on Kaiser land only; and (6) Landfill development without Townsite development. All of these options, save the No Action alternative, would result in landfill development of some sort and would require some portion of the land exchange to occur.

The BLM proposed several alternatives that would have been responsive to the need to meet long-term landfill demand, such as a landfill on other Kaiser property, waste diversion, offsite landfill locations, landfill mining, alternative Townsite locations, and alternative Townsite uses. The BLM did not, however, consider these options in any detail because each of these alternatives failed to meet the narrowly drawn project objectives, which required that Kaiser's private needs be met.

Our holdings in *Friends* and *Carmel-By-The-Sea* forbid the BLM to define its objectives in unreasonably narrow terms. The BLM may not circumvent this proscription by adopting private interests to draft a narrow purpose and need statement that excludes alternatives that fail to meet specific private objectives, yet that was the result of the process here. The BLM adopted Kaiser's interests

as its own to craft a purpose and need statement so narrowly drawn as to foreordain approval of the land exchange.[9] As a result of this unreasonably narrow purpose and need statement, the BLM necessarily considered an unreasonably narrow range of alternatives. We therefore affirm the district court's grant of summary judgment on both the "purpose and need" and "reasonable range of alternatives" claims under NEPA.

B. Bighorn Sheep

Under NEPA, an EIS must contain a "reasonably thorough" discussion of an action's environmental consequences. *State of California v. Block,* 690 F.2d 753, 761 (9th Cir.1982). An EIS must "provide full and fair discussion of significant environmental impacts." 40 C.F.R. § 1502.1. Our review is limited to whether an EIS took a "**hard look**" at the environmental impacts of a proposed action. *Id.* We must make a "pragmatic judgment whether the EIS's form, content and preparation foster both informed decision-making and informed public participation." *Block,* 690 F.2d at 761.

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[9] The dissent conflates two unrelated issues: (1) adequacy of the purpose and need statement under NEPA and (2) adequacy of the public interest determination under the Management Act. Dissent at 1082-83. Whether the BLM gave full consideration to public interest factors, however, has no bearing on the sufficiency of the EIS under NEPA. The dissent concludes that so long as the BLM properly concluded that the project is in the public interest, there is no NEPA violation-that is, that the ends justify the means. We disagree.

Contrary to the district court's conclusion, we find that the EIS contains extensive analyses of potential impacts on Bighorn sheep, including migration patterns, habitat loss, and water accessibility. The district court cited two particular deficiencies with respect to Bighorn sheep. The district court found that the EIS did not address the potential impact of tortoise-proof fencing on sheep migration patterns and failed to specify what a proposed "buffer zone" would entail.

The EIS does, however, contain the information the district court believed was missing.[10] The EIS includes a 56-page report on Bighorn sheep. The report is based on an extensive monitoring study, utilizing sheep capture, radio telemetry, and genetic testing methods. The EIS states that any installed tortoise-proof fencing will be designed to allow for sheep movement.[11] The EIS explains that the buffer zone constituting "644 acres of potential habitat would remain as natural open space around the periphery of the proposed landfill. This habitat would provide a buffer zone between the landfill operation and relocated sheep population."[12] Though the EIS does not "exactly specify" what the buffer zone

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[10] The Final EIS incorporated the earlier Draft EIS.

[11] Other evidence in the record indicates that fencing of this type is eighteen inches high; high enough to restrict tortoise movement but low enough to present no obstacle to Bighorn sheep.

[12] The Riverside County Specific Plan clarifies that the 644 acre area will provide a buffer between sheep and the *footprint* of the landfill.

entails, it does contain a "reasonably complete" discussion of this mitigation measure. *See Okanogan Highlands Alliance v. Williams,* 236 F.3d 468, 473 (9th Cir.2000) (holding that an EIS must include a "reasonably complete discussion of possible mitigation measures."). We are not authorized to substitute our judgment for that of the agency. *Block,* 690 F.2d at 761. Having concluded that the BLM did take a "**hard look**" at Bighorn sheep, our review is at an end. *Id.* We reverse the district court on this issue.

C. Eutrophication

We apply the same analysis to the district court's conclusion that the EIS insufficiently addressed the potential for eutrophication, or introduction of nutrients into the desert environment. Unlike its discussion of Bighorn sheep, the EIS contains no specific discussion of eutrophication. The BLM argues that the relevant discussion is present in other, scattered sections of the EIS. The EIS does, for example, discuss "Biological Resources" and "Air Quality." The "Biological Resources" section discusses mitigation measures, such as daily cover of the working face of the landfill, that will reduce "increased food availability." The same "Biological Resources" section references a separate "Air Quality" section, which calculates potential levels of nitrate production, to support the conclusion that atmospheric nitrate deposition resulting from landfill operations will be dwarfed by other sources in the Los Angeles Basin. The EIS therefore concludes that nitrate deposition from landfill sources will have no effect on Joshua Tree's ecosystem.

In determining whether an EIS fosters informed decision-making and public participation, we consider not only its content, but also its form. *Block*, 690 F.2d at 761. Here, the discussion of eutrophication is neither full nor fair with respect to atmospheric eutrophication. A reader seeking enlightenment on the issue would have to cull through entirely unrelated sections of the EIS and then put the pieces together. To find the brief discussion of atmospheric eutrophication, a reader must begin in the "Biological Resources" section, which then refers to data from the "Air Quality" section, and then with respect to effects only on Joshua Tree, not the surrounding area. Rather than address eutrophication up front, the BLM instead attempts to cobble together a "hard look" from various other analyses as varied as air quality and disease vector control. This patchwork cannot serve as a "reasonably thorough" discussion of the eutrophication issue.[13] We therefore affirm the

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[13] The dissent's contention that eutrophication is "*not* a serious issue" is at odds with the analysis of both the National Park Service and the IBLA. The National Park Service found the eutrophication issue sufficiently serious as to merit an official comment, as the dissent itself points out. Dissent at 1087-88. The IBLA did not take the position that eutrophication is unimportant, but instead concluded that the EIS adequately took a "hard look" at the issue.

The dissent contends that the EIS contains a "map" to the eutrophication issue that is sufficient to meet the "hard look" requirement." Dissent at 1087-88. Whether the dissent or a reviewing court, examining an EIS with the benefit of law clerks and post-hoc rationalizations from counsel, is able to follow a tortuous map to the buried treasure of a eutrophication discussion is not the question. In examining an EIS, we must make a "*pragmatic* judgment whether the EIS's form, content

district court's decision on this NEPA claim.

VI. Cross-Appeal

The Charpieds cross-appeal the district court's determination that they lacked standing to pursue their claim against the National Park Service ("Park Service") under NEPA, the National Park Service Organic Act, 16 U.S.C. § 1, and the California Desert Protection Act, 16 U.S.C. § 410aaa, *et seq.* The Charpieds also appeal the district court's grant of summary judgment to Kaiser and the BLM on NEPA claims concerning the EIS's sufficiency regarding desert tortoises, visual, noise, and night lighting impacts, groundwater, and air quality. We affirm the district court on all issues on cross-appeal.

Although the BLM was required to solicit the Park Service's input on the EIS, 40 C.F.R. § 1503.1, the BLM did not need the Park Service's approval to complete the land exchange. The Park Service was involved in the Kaiser proposal only as a cooperating agency. NEPA regulations distinguish lead agencies from cooperating agencies. 40 C.F.R. § 1501.6. Cooperating agencies must, at the request of the lead agency, help prepare environmental analyses, including portions of the EIS. *Id.* In October 1996 the Park Service recommended that the BLM reject the Kaiser proposal and stated that the Draft EIS did not

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and preparation foster both informed decision-making and informed public participation." *Block*, 690 F.2d at 761 (emphasis added).

sufficiently address certain environmental impacts. In December 1996 the Park Service changed its position, and supported the EIS and Kaiser proposal.

Standing requires three elements: (1) actual or imminent injury in fact; (2) a causal connection between the injury and the conduct complained of; and (3) likelihood that a favorable decision will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The Charpieds argue that the Park Service's reversal constituted a procedural violation under NEPA, the California Desert Protection Act, and the National Park Service Organic Act, and that relaxed standards of redressability should apply. *See Lujan*, 504 U.S. at 572 n. 7, 112 S.Ct. 2130. The Charpieds, however, have not identified any violation of a procedural duty by the Park Service.[14] The relaxed standard therefore does not apply. A favorable decision would not redress the injury complained of because the Park Service is not the lead agency responsible for approving the Kaiser project. Even if the Park Service were to rescind its approval of the landfill project, the BLM, as the lead agency, would be free to move forward. Accordingly, we affirm the district court's holding that the Charpieds lack standing under NEPA, the National Park Service Organic Act, and the California Desert Protection Act.

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[14] To the extent that the Park Service may have assumed a contractual duty to assist the BLM, the Charpieds cannot demonstrate that they are third party beneficiaries.

Lastly, we briefly address the Charpieds' impact-specific NEPA claims. As discussed above, our review is limited to whether the EIS took a "**hard look**" at the landfill's potential environmental impact. *Block*, 690 F.2d at 761. In challenging the EIS's discussion of desert tortoises, visual, noise, and night lighting impacts, groundwater, and air quality, the Charpieds take issue with the EIS's methodology and ultimate conclusions. Without taking a position on those conclusions, we find that the EIS's discussion of these issues is sufficient to foster informed decision-making and public participation. We therefore affirm the district court's grant of summary judgment on these NEPA claims, as well as its dismissal of the Charpieds' complaint against the Park Service.

VII. Conclusion

The judgment of the district court is **AFFIRMED** in part and **REVERSED** in part. This case is **REMANDED** for further proceedings consistent with this opinion. Each side shall bear its own costs on appeal.

TROTT, Senior Circuit Judge, dissenting:

What sane person would want to attempt to acquire property for a landfill? Our well-meaning environmental laws have unintentionally made such an endeavor a fool's errand. This case is yet another example of how daunting-if not impossible-such an adventure can be. Ulysses thought he encountered fearsome obstacles as he headed home to Ithaca on

the Argo, but nothing that compares to the "due process" of unchecked environmental law. Not the Cyclops, not the Sirens, and not even Scylla and Charybdis can measure up to the obstacles Kaiser has faced in this endeavor. The record here exceeds 50,000 pages. At the beginning, Kaiser had a partner, Browning-Ferris Industries ("BFI"), but BFI-a company experienced in the field of solid waste disposal-dropped out after investing $45 million in the project with nothing to show for it in return. I agree with my colleagues insofar as they dispense with the cross-appeal and the public interest and bighorn sheep issues, but I dissent with respect to the rest. The final irony is that my colleagues send the case back to the Bureau of Land Management ("BLM") to do something BLM has already adequately done: consider the value of the land involved as a commercial landfill.

I

BACKGROUND

Kaiser's proposed landfill formally began in 1989-20 years ago-when it filed an application with BLM for a land exchange to facilitate the construction of what it called the Eagle Mountain Landfill. From 1948 to 1983, Kaiser had operated an iron ore mine on 5,000 isolated acres of land it owned or controlled in Riverside, California. In 1989, Kaiser sought to acquire federal lands as part of an exchange that would facilitate the Eagle Mountain project. The landfill would have been the first to comply with new Environmental Protection Agency guidelines. The federal land Kaiser sought mostly encircled the spent

mines. Sixty percent of the targeted federal land is classified as mountainous. Kaiser in turn offered 2,846 acres of mostly flat desert land to become part of the California Desert Conservation Area located about 1.5 miles from the border of Joshua Tree Natural Park ("JTNP"), and twenty miles from the park's nearest visitor center. The proposed landfill would accept municipal, non-hazardous, solid waste from seven Southern California counties, to be delivered mostly by train.

In 1994, the State Superior Court in San Diego County further described this project as follows:

> "[Kaiser's] mining operation resulted in the excavation of three large open pits; each[ ] one to two miles long. The mining operation ceased in 1983, and Kaiser has leased the mine site to the prospective operator of the landfill.
>
> "[Kaiser/Mine Reclamation Corp.] plans to utilize the open pits left from the mining operation to create what all parties have agreed is the largest landfill in the country. The landfill footprint will encompass approximately 2,262 acres within a larger project area of 4,654 acres. The landfill will have the capacity to accept up to 20,000 tons per day of wastes for a minimum of 115 years.
>
> "The landfill will receive most of the waste from Los Angeles and other Southern California counties. Ninety percent of the garbage will be shipped by rail and the

> balance by truck. All waste will be delivered after processing at materials recovery facilities (MRF's) which accept delivery of trash from homes and businesses and compact the waste into containers for transportation.
>
> "The landfill accepts only nonhazardous solid waste and inert wastes that have been processed through MRFs. The Draft EIR states a typical MRF would require about 10 to 30 acres and an enclosed structure of about 100,000 square feet. [ ] The garbage is delivered to the MRF by truck and dumped on the floor of the structure. Workers sort through the waste and remove unacceptable materials such as hazardous waste, sewage sludge, radioactive, biological or infectious waste, and other materials needing special handling. Recyclable materials may be recovered. The remaining wastes are compacted and packaged into containers that hold up to 25 tons each and then loaded onto rail cars, each of which holds 10 containers. The containers are then transported to the landfill. [ ] Approximately 10 percent of the wastes will be transported by truck rather than rail."

Nat'l Parks & Conservation Ass'n v. County of Riverside, 42 Cal.App.4th 1505, 50 Cal.Rptr.2d 339, 342 (1996).

I do an injustice to the record by attempting to summarize the legal hurdles Kaiser has negotiated in

its thus-far vain attempt to accomplish its goals-at a cost now in excess of $50,000,000-but here goes.[1]

First, the permits. After a lengthy public hearing process, Riverside County issued all local land use approvals, including a zoning change. Then, California's South Coast Air Quality Management District approved permits for air emissions from the project. Next the United States Fish and Wildlife Service evaluated the potential impacts of the project on threatened or endangered species and thrice issued a "no jeopardy" opinion. The permits were approved only after searching inquiries by the issuing agencies. All the environmental laws were addressed.

Then, the matter turned into a lawsuit in state court. *See Nat'l Parks & Conservation Ass'n v. County of Riverside,* 71 Cal.App.4th 1341, 84 Cal.Rptr.2d 563 (1999). *Two* Superior Court trials later, and after the Draft EIS/EIR had been redone, the California Court of Appeal ruled that Riverside County and BLM had adequately addressed all environmental concerns under California law. This was the *second* state appeal in this dispute. In many respects, California's environmental laws are more demanding than their

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[1] I apologize to the reader for including extensive parts of the record in my opinion, but the record-overlooked in large measure in the majority's opinion and the district court-is what this case is all about. Unfortunately, the huge excerpt of record will not be routinely circulated to the rest of the Ninth Circuit in connection with an en banc call, so it is here that I must prove the validity of my conclusions.

federal counterparts.

Moreover, Kaiser had actively engaged the National Park Service ("NPS") in an ongoing process designed to protect Joshua Tree National Park. As described by the Interior Board of Land Appeals ("IBLA"), the agreement reached "gives NPS precisely what they had requested as early as 1992-a comprehensive, long-term monitoring and mitigation program, which runs for the life of the project and is specifically tailored to detect and to address any unforeseen impacts on JTNP." This is how the IBLA described the National Park Service's involvement:

> When the decision was made [in 1995] to prepare the new EIS/EIR, BLM invited the NPS to participate as a "cooperating agency" in the preparation of the new document-a role that would recognize NPS' special expertise in evaluating impacts on the newly designated JTNP.
>
> At the scoping stage, the NPS submitted a 12-page letter outlining issues that it wanted to see addressed in the EIS/EIR. With the assistance of the consultant preparing the EIS/EIR, BLM reviewed these issues one by one, held a series of meetings with the NPS staff, and incorporated many of the NPS's recommendations into the Draft EIS/EIR. Before the Draft EIS/EIR was issued, BLM provided an "administrative draft" of the document to NPS for review, and the NPS provided more than 150 pages of comments. Again, BLM responded point by point to

NPS's comments in a 34-page response. BLM accepted many of the NPS's recommendations and provided detailed explanations for those it declined to accept. When the Draft EIS/EIR itself was issued, the NPS submitted a third round of comments, even more detailed than the last. Again, BLM painstakingly reviewed the NPS's comments and addressed each of them.

As the new EIS/EIR was being prepared, the NPS again raised the issue of the project's potential unknown and unpredictable impacts, as it had in 1992. To address this concern, [Kaiser] MRC revived an idea that the NPS itself had proposed during preparation of the first EIS/EIR-namely, entering into an agreement that would establish a long-term mitigation and monitoring program. Over the next 18 months, MRC and the NPS engaged in extensive discussions to develop a detailed, enforceable agreement. In the end, MRC and NPS entered into a binding agreement that gives NPS precisely what they had requested as early as 1992-a comprehensive, long-term monitoring and mitigation program, which runs for the life of the project and is specifically tailored to detect and address any unforeseen impacts on JTNP. While the NPS made it clear that it would prefer to avoid any industrial-type activity at the mine site, the agency agreed that if the landfill project were to go forward, the agreement with MRC provided the appropriate safeguards for

> addressing NPS's concerns about any gradual, long-term impacts (which cannot be accurately predicted).

(quotation omitted).

Furthermore, a Technical Advisory Panel composed of eminent scientists and engineers from major California Universities was called in to look at the project and concluded:

> "[T]he designers have done essentially all that is humanly possible to make this a safe landfill that will be protective of ... the underlying and surrounding environment. Given the favorable site conditions, sophisticated waste containment systems, and elaborate monitoring systems, *the proposed Eagle Mountain Landfill could well become one of the world's safest landfills and a model for others to emulate.*

(emphasis added).

County officials similarly noted that Kaiser had "overdone its mitigation" and had "bent over backwards in addressing all of the impacts which have been brought up by previous commissions, by the courts, by our staff, and by this particular commission."

The final Environmental Impact Statement prepared for this project consists of (1) a 900-page Draft EIS ("DEIS"), which details the potential environmental impacts of the project, the range of

alternatives that were considered, and proposed mitigation, and (2) a 1600-page Final EIS ("FEIS"), produced following extensive and exhaustive public comment on the DEIS. The required National Environmental Policy Act ("NEPA") documents were issued jointly by the BLM and Riverside County in 1996, 13 years ago. In 1999, the IBLA issued a thirty-two page opinion affirming BLM's decisions.

But, we are just getting started. The same plaintiff who lost in state court filed this federal lawsuit, in 1999-10 years ago. The case took over five years in district court simply *to get to summary judgment!* It took the court *three years* to rule on the completed motions, and, here we are at the end of 2009, another five years later, burdened by a seriously flawed district court opinion, hitting the reset button, and unnecessarily sending the parties back to a Sisyphean hill which cannot be climbed in a lifetime-ten years after the IBLA's opinion. How many of the people who started this project are still employed by Kaiser, are still in public service, or for that matter, are still alive? Yet, the *process* has developed an eternal life of its own as full-employment for all swept along with or by it.

Now, in an opinion that is not only not supported by the record, but irreconcilable with it, the endless process continues. No doubt we will see this case back again, years from now, unless the proponents of this project-including seven California counties-weary of it and throw in the towel, thwarted and defeated not by substance, but by interminable process.

II

PURPOSE AND NEED/PUBLIC INTEREST/CONSIDERATION OF ALTERNATIVES

A.

Purpose and Need

My colleagues' opinion concluding that BLM's Statement of Purpose and Need for the project is defective completely misunderstands the purpose of this requirement in a setting where a private entity approaches a government entity with a joint proposal that will benefit both. Of course there is a private purpose driving this project. But the project benefits *both* parties, not just Kaiser. To isolate one without factoring in the other is patently illogical. To illustrate the folly of this fallacy, all one has to do is examine the IBLA's opinion outlining the habitat benefits of this exchange to fish and wildlife and threatened and endangered species. Here, however, is how BLM's goal reads in the Introduction of the Draft EIS/EIR:

> **1.3.1 Project Purpose and Need**
>
> The primary purpose of the Project is to develop a new Class III nonhazardous municipal solid waste landfill to meet the projected long-term demand for environmentally sound landfill capacity in Southern California; provide a long-term income source from the development of a

nonhazardous municipal solid waste landfill; find an economically viable use for the existing mining by-products at the Kaiser Eagle Mountain Mine site, including use of existing aggregate and overburden; and provide long-term land use and development goals and guidance for the Townsite.

Several recent studies documenting the need for additional landfill capacity in Southern California indicate that additional capacity is needed to meet the long-term demands (i.e., 1995 to 2050) and possible short-term needs (i.e.1995 to 2000) of the Southern California region (California Integrated Waste Management Board [CIWMB],1992; CIWMB, 1994, Draft Countywide Siting Elements-for the seven counties viewed as potential sources of waste for the proposed landfill-1995 and 1996). Additional capacity is also required for counties and municipalities in Southern California to satisfy the legal requirements of AB 939 to demonstrate adequate waste disposal capacity. The solid waste capacity in southern California changes often due to a number of factors, including: (1) the closure of small, ineffective landfills as new regulations take effect; (2) the development of larger regional sites; (3) the uncertainty of permitting efforts of new and expanded landfills; (4) litigation over land use issues of landfills and (5) the privatization of publicly owned landfills. These factors necessitate that cities and counties undertake long-term

> planning to ensure that adequate capacity is available.
>
> The discussion below of waste capacity in the Southern California region is based on projected short-, medium-, and long-term needs. Future needs are based on several continuing and changing trends: (1) increase in population (California's population is expected to more than double from its current 30 million to more than 60 million by the year 2040 [California Department of Finance, 1993]); (2) expanded waste diversion and recycling, which is reducing the amount of material being disposed of in landfills; and (3) landfill closures and development proposals that will affect future disposal capacity.

This section then takes 12 pages reviewing and analyzing a "critical" landfill capacity shortfall in Southern California, focusing on the counties of Los Angeles, San Bernardino, Riverside, Orange, Santa Barbara, Ventura, and San Diego the seven counties within the proposed landfill's service area. The detailed discussion highlights a critical need for "additional disposal capacity" in the service area. During this particularized discussion, Kaiser's obvious pecuniary goals are nowhere in sight.

In the final EIS/EIR, we discover that the need for landfill capacity had *increased* since the Draft.

The result-oriented notion that BLM has "narrowly drawn" this statement of purpose and need is utterly wrong. Of course BLM acknowledged

Kaiser's purpose-*the law requires BLM to do so!* For private, non-federal proposals, "[a]gencies ... are precluded from completely ignoring a private applicant's objectives." *Colo. Envtl. Coal. v. Dombeck,* 185 F.3d 1162, 1175 (10th Cir.1999) (involving Vail Associates expansion of its existing ski area into the White River National Forest); *see also Citizens Against Burlington, Inc. v. Busey,* 938 F.2d 190 (D.C.Cir.1991). Read with an open mind, this statement suffers from no defects whatsoever.

B.

Public Interest

Furthermore, my colleagues' opinion inexplicably excludes from the evidence it draws upon to support its errant conclusion-that the Purpose and Need Statement is wanting-an important requirement of BLM's decision-making process: the statutory requirement that it conclude "that the public interest will be well served by making that exchange." Federal Land Policy and Management Act of 1976 ("FLPMA"), Pub.L. No. 94-579, § 206(a), 90 Stat. 2743, codified at 43 U.S.C. § 1716(a) (1994). The Code of Federal Regulations is quite specific about what must go into a "public interest" determination.

BLM must consider

> the opportunity to achieve better management of Federal lands, to meet the needs of State and local residents and their economies, and to secure important objectives, including but not limited to:

> Protection of fish and wildlife habitats, cultural resources, watersheds, wilderness and aesthetic values; enhancement of recreation opportunities and public access; consolidation of lands and/or interests in lands, such as mineral and timber interests, for more logical and efficient management and development; consolidation of split estates; expansion of communities; accommodation of land use authorizations; promotion of multiple-use values; and fulfillment of public needs. In making this determination, the authorized officer must find that ... [t]he intended use of the conveyed Federal lands will not, in the determination of the authorized officer, significantly conflict with established management objectives on adjacent Federal lands and Indian trust lands. Such finding and the supporting rationale shall be made part of the administrative record.

43 C.F.R. § 2200.0-6(b) (1988).

The record shows that BLM made such a careful determination, as reflected in the IBLA's opinion rejecting the NPCA's and the Charpieds' allegations to the contrary:

> As noted above, contrary to NPCA's assertions (Reply Brief at 3), BLM's decision documents and supporting Draft and Final EIS/EIR contain extensive discussions of the [public interest] factors set out in 43 C.F.R. § 2200.0-6(b). *That record shows that the*

acquired private lands have substantial value as habitat for threatened and endangered species, so that acquiring them serves the purpose of protection of fish and wildlife habitats. The position of those lands relative to current Federally-owned habitat means that their acquisition will allow for more logical and efficient management and development. We also recognize that, apart from the direct benefits of acquiring the parcels of offered private lands, approval of the exchange promotes the Project, which undeniably meets the "needs of State and local residents and their economies" by allowing both a 100-year waste disposal facility for a major metropolitan area, as well as economic development of the Project area. BLM may properly consider these factors as part of its obligation to promote multiple-use values, to fulfill public needs, and to expand communities.

Under section 206(a) of FLPMA, the Department must also find "that the values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the values of the non-Federal lands or interests and the public objectives they could serve if acquired." There is no doubt that the Federal lands and interests to be conveyed here (the selected public lands) have been greatly reduced in value due to their proximity to Kaiser's mine and its spoil piles, tailing ponds, etc. (Appraisal Report Vol. I at 9-13.)

> Further, these lands are encumbered by mining claims held by KEM, such that they may be mined or even patented. *Id.* at 15. Against this background, it is evident that *disposal of these lands in exchange for wildlife habitat plainly entails a net gain for the public.*

(emphasis added).

My colleagues' opinion also ignores another section of the DEIS's articulation of the Project's purpose and need involving the benefits to Riverside County, where it will be located:

> 1.3.2.1 *County of Riverside*
>
> The proposed County action is based on the County's authority for reviewing land use applications (i.e., Specific Plans for the proposed landfill and the Townsite) for the proposed landfill and the Townsite. In making a decision on the pending land use applications, the County will consider the following County objectives.
>
> • Provide the County and jurisdictions within the County with environmentally sound, long-term disposal capacity for waste generated within the County.
>
> • Provide the County with income from the disposal fees for out-of-county waste disposed of at the site. Provide for the acquisition and preservation of valuable open space lands in

environmentally sensitive areas, for the preservation and enhancement of biological, scenic, and cultural resources in the County, and research and education concerning conservation of natural resources. This activity will be funded through the contribution of one dollar per ton of waste deposited at the landfill into a mitigation monitoring trust fund administered by the County.

• Reclaim lands disturbed by previous mining activities.

• Assist jurisdictions within the County that use the site for solid waste disposal to meet the long-term landfill capacity as set forth by state law (AB 939).

• Provide a remote, regional municipal solid waste landfill that allows transportation of waste primarily by rail and uses existing transportation infrastructure.

• Provide long-term disposal capacity to allow the County to continue closing existing unlined landfills within the County.

In evaluating this project in terms of the its purpose and the public interest, BLM added this worthy consideration:

Based on economic reports prepared by experts, the Project is projected to generate $210 to $280 million in revenue to the county

> in the first twenty years of operation. That additional revenue can be used to provide needed federal services to the residents of Riverside County. The Project will also support or save, on an annual basis, an average of 1,354 jobs in the county during the first 20 years. The overall economic impact during the next twenty years to the county is projected to be in excess of $3 billion.
>
> Also,
>
> The Project will be the only landfill in Riverside County which meets current groundwater protection and other current state and federal environmental protection requirements, thus providing sufficient waste disposal capacity to *enable the county to close existing landfills that do not meet current state and federal regulations.*

(emphasis added).

This is what BLM's district manager had to say about the value of this project to the United States in his feasibility report dated February 8, 1993:

Public Benefits and Relationship to Land Use Planning

> The public lands are identified for disposal and the private lands are recommended for acquisition under the California Desert Conservation Area (CDCA) Plan, as amended. The offered private lands are within and

adjacent to the Chuckwalla Bench and Dos Palmas/Salt Creek Areas of Critical Environmental Concern and Orocopia Mountains Wilderness Study Area designated in the CDCA Plan. Respectively, these areas contain important habitat for the desert tortoise, a Federally listed threatened species, and riparian habitat supporting[ ] the desert pupfish, a Federally listed endangered species. The land exchange would secure important habitat for these species.

He augmented his favorable opinion in 1997 in his Notice of Decision asking for public comment:

The non-Federal lands to be acquired by the United States are located within and adjacent to the Chuckwalla Bench and Dos Palmas/Salt Creek Areas of Critical Environmental concern. Respectively, these areas contain important habitat for the Desert Tortoise, a federally listed threatened species, and habitat supporting two federally listed endangered species, the Yuma Clapper Rail and Desert Pupfish.

The Federal lands being conveyed consist of highly disturbed lands in and around the Eagle Mountain Iron Ore Mine located north of Desert Center, California. The Federal lands will be used to facilitate the proposed development of the Eagle Mountain Landfill and Recycling Center Project, a Class III non-hazardous municipal solid waste landfill in Riverside County. Disposal of the Federal

> lands is consistent with the California Desert Conservation Area Plan of 1980, as amended. The public interest will be well served by making the exchange.

In summary, my colleagues' opinion suffers from a fundamental flaw in its quarantined analysis of two interrelated issues, the purpose and need for the project, on one hand, and whether the exchange of federal land serves the public interest on the other. They grudgingly conclude that the BLM adequately determined that the public interest is served by the landfill, but, in the same breath, they claim to have found a defect in BLM's articulation of the project's purpose and need. How can a project that satisfies the rigorous public interest demands of the exchange law fail because its purpose and need over represents primarily private goals and objectives? It is a mistake to approach these two statutory requirements as separate and independent from each other, especially in a case such as this where the exchange is between a private entity and a public interest. Of course Kaiser has its own goals it hopes to accomplish from this project, and of course it hopes to make a profit, but it seems blindingly apparent that its goals dovetail with the public's need for a landfill, and especially a landfill such as this that not only meets and far exceeds our laudable environmental expectations, but greatly *enhances, by the acquisition of 2,846 acres, contiguous federal land that protects endangered species living on it.*

The Record of Decision says this about value to BLM:

> **4.2 Acquisition of Important Wildlife**

Habitat: The proposed land exchange presents an opportunity for BLM to achieve better management of Federal lands by allowing BLM to consolidate Federal ownership of land that contains habitat for listed species. In the land exchange, BLM would acquire approximately 2,846 acres of Kaiser lands, which contain important habitat for the desert tortoise, a Federally listed threatened species, and for the desert pupfish, a Federally listed endangered species, and for other environmentally sensitive species. In addition to the lands acquired as part of the land exchange, BLM also would acquire approximately 400 acres of desert tortoise habitat for mitigation of impacts caused by the Project. This land would be purchased by the applicant, and then would be conveyed in fee to BLM as mitigation for the loss of 160 acres of tortoise habitat, which would be used for widening and extending the Eagle Mountain Road as part of the Proposed Action. Given the lands to be acquired, including the mitigation land, the land exchange would further BLM's objective of securing additional protection of important habitat for sensitive species.

The Kaiser lands to be acquired by BLM in the land exchange are located in four geographic areas (see Exhibit "B"). The location of these lands, and the environmental benefits associated with their acquisition, are summarized a follows:

Group A: Salt Creek (Dos Palmas) ACEC

T. 8 S., R. 11 E.

Section 13: NE1/4

Section 21: E1/2E1/2SE1/4

Section 23: Described in metes and bounds.

These three parcels are located in the vicinity of the Salt Creek (Dos Palmas) Area of Critical Environmental Concern (ACEC). The entire ACEC area of about 14,000 acres includes both Federal and private lands and is popularly referred to as Salt Creek (Dos Palmas) ACEC, even though the ACEC only includes the Federal lands. One of the management objectives in the Salt Creek (Dos Palmas) area is to acquire private lands for the management of various palm oases and seeps that provide habitat for the desert pupfish and Yuma clapper rail, both Federally listed endangered species. Over 3,200 acres have been acquired or are in the process of being acquired by BLM. All three of Kaiser's parcels will contribute to consolidating Federal lands, thus enhancing management of the area. The parcel in Section 23 contains desert pupfish habitat along a tributary to Salt Creek.

Group B: Orocopia Mountains Wilderness

T. 7 S., R. 12 E.

Section 35: Described by metes and bounds

Section 36: N1/2SW1/4, SE1/4NW1/4, S1/2NE1/4

T. 7 S., R. 13 E.

Section 31: Described by metes and bounds

These three parcels are located on the southern boundary of the Orocopia Mountains Wilderness Area. They are not contiguous to the Wilderness Area. However, consolidation of Federal lands in this area would simplify land management and enhance recreational opportunities. These parcels are in an area designated by the USFWS as critical habitat for the desert tortoise under the Endangered Species Act. A population of approximately 50 Nelson's bighorn sheep occurs in this area and another population of approximately 100-200 sheep occurs in the Chocolate Mountains to the south. These populations migrate between the mountain ranges in the vicinity of the parcels. Nelson's bighorn sheep is a State of California fully protected species and a BLM sensitive species. Populations of Orocopia Sage, a Federal species of concern, occur on all three parcels. Acquisition of Kaiser's parcels would block up a large area of BLM managed lands and enhance management of lands used by migrating bighorn sheep.

In summary, my colleagues' opinion's claim that BLM "foreordained" the approval of this exchange is indefensible in terms of the record.

C.

Consideration of Alternatives

These egregious errors are then improperly used to force the declamatory conclusion that BLM's consideration of a "range of alternatives" was "similarly unreasonable" and defective. This is easily demonstrated to be wrong simply by reading the record, which contains a pithy section discussing a range of alternatives. Identified and discussed at length are the following:

Alternatives Considered in Detail

1. No action

-Status quo

2. Reduced volume of onsite disposal

3. Alternate road access

-No new road construction

4. Rail access only

-Elimination of hauling trucks

5. Landfill on Kaiser land only

-No land exchange/small landfill footprint

6. Landfill development/no Townsite development

-No resuscitation of the existing Townsite

Alternatives Considered But Eliminated

1. Landfill on other Kaiser property

2. Waste Diversion

3. Proposed offsite/and fill diversions

4. Landfill mining

5. Alternative Townsite locations

6. Alternative Townsite land use and density

Accordingly, BLM determined that the preferred alternative is the Proposed Landfill Action. Riverside County, required to conduct a different analysis, agreed with this assessment:

> Pursuant to CEQA, the County has determined that the environmentally superior alternative is the No Action Alternative. The No Action Alternative would leave the Project site in its present condition and avoid the potential impacts of the proposed landfill. The No Action Alternative could, however, lead to its own adverse impacts, such as the adverse visual impact of

the disturbed mining site and the remaining tailing piles. Also, the potential impacts associated with continued reliance on new or existing landfills in Southern California could be substantial, such as air quality impacts or groundwater impacts at existing unlined landfills. In addition, the other objectives of the Project as listed in Sections 1.3.2.1 and 1.3.2.2 would not be realized if the No Action Alternative were chosen. However, with respect to impacts in the vicinity of the Project site, the No Action Alternative is, on balance, the environmentally superior alternative.

Where the No Project Alternative is determined to be the environmentally superior alternative, CEQA requires that an environmentally superior alternative be selected from the remaining alternatives. There are no clearly environmentally superior alternatives compared to the No Action Alternative. However, as required by Section 15126(d)(4) of the CEQA Guidelines, the County has determined that, on balance the Proposed Action Alternative is the environmentally superior alternative among the remaining alternatives. Many of the potential impacts of the proposed Project are the same or similar to the potential impacts of the remaining alternatives. Some alternatives would, however, have a greater level of impacts than the proposed Project. For example, the Landfill on Kaiser Land Only Alternative without the land exchange

would diminish the protection of habitat and wildlife because there would be no consolidation of sensitive habitat lands resulting from the land exchange.

That alternative and the Reduced Volume Alternative would also decrease the level of contribution to the Environmental Mitigation Trust Fund, thus diminishing the funding available for acquisition of habitat lands. The Reduced Volume Alternative and the Rail Access Only Alternative could also extend the duration of certain impacts by extending the life of the landfill. These other alternatives, however, could reduce the level of a few impacts in comparison to the proposed Project. Only the No Action Alternative would result in impacts considered not to be significant.

In summary, BLM approved this exchange because the project not only provides a benefit to Southern California and to Riverside County, but also because it serves important federal law management objectives.

III

EUTROPHICATION

What is it? Essentially, eutrophication is a term that refers to an increase in chemical nutrients in an ecosystem, either on land or in water. The word itself is derived from Greek, "eu," meaning "good," and "trophic," meaning "food" or nutrients. Nitrogen,

which is at the root of the controversy in this case, is an essential element in the lives of both animals and plants and, in fact, occurs naturally in great quantity in the atmosphere. Nitrogen is also a key element of the fertilizer used positively to increase the food productivity of land throughout the world.

The environmental "problem," of course, occurs with anthropogenic eutrophication which causes alterations in plant or animal life-or both-in a manner regarded as not positive. I note that most of our national eutrophication concerns involve negative changes in bodies of water caused by the anthropogenic introduction of excessive amounts of phosphorus. I have yet to find a situation where the introduction of nitrates into a desert ecosystem has caused material environmental harm. The Charpieds fear that this is such a case, a concern refuted by the facts.

The parties cannot agree on the scope of alleged eutrophication concerns in this case as it relates to the consequences of nitrate deposition. As summarized by the district court,

> Plaintiffs contend that BLM neglected to address significant impacts on the environment due to eutrophication including an increased presence of scavenger raven and coyote populations, impacts on bird, mice, and other small animal feeding habits due to the nutrients from the landfill and windblown trash, and irreparable impacts on the desert food chain.

Relying on the closed and covered nature of the landfill, Kaiser asserts that the only source of nitrates related to the landfill are an insignificant consequence of "atmospheric nitrate deposition from the emission and transport of anthropogenically generated nitrogen compounds."

In the main, the plaintiffs complain that the defendants did not take a "**hard look**" at this problem, as they were required to do by NEPA. I disagree.

In their Statement of Reasons supporting their appeal to the IBLA, the Charpieds describe their eutrophication problems as follows:

> A major concern to commenters, particularly NPS, was the impact of the dump adding a large volume of nutrients into an environment which has been nutrient scarce for millions of years (see FEIS/R under Agencies page 69). Despite repeated request [sic] from NPS to address the eutrophication process, BLM and Kaiser/MRC refused to conduct such an analysis.
>
> The EIS/R admitted "an increase in road kills of local wildlife species would likely result from the project's 12 to 16 hour per day truck traffic along access roads" (see DEIS/R 4.7-6)[.] It is also acknowledged that common raven and other scavenger populations "could increase in response to increased food in the form of road-killed animals[.]" *Id.* Yet, the EIS/R never grappled with the important

concept of eutrophication from this increase, or other possible causes of eutrophication, such as adding 20,000 tons of food (garbage) to a nutrient scarce area. The EIS/R noted the Council on Environmental Quality's ("CEQ") description of biodiversity: "the concept that all components of ecological systems, both living and nonliving, are interconnected in a hierarchical continuum, and that changes in the diversity at any level in that hierarchy can have effects at other levels ..." (see DEIS/R 3[.]7-28). The EIS/R also acknowledged that growing scientific evidence supported a deep concern for biodiversity caused by human activity that adversely affects the components of ecosystems and their interconnections; this results not only in species extinction, but in disruptions of the functions of ecosystems on which all life depends; and the introduction of exotic species can eliminate native species through predation, competition, or disease transmission, and alter interconnections between species, changing ecosystem functions (see DEIS/R 3.7-30). Further the EIS/R recognized that "because water and primary productivity are limited, desert ecosystems recover very slowly from disturbances that disrupt the interconnections between living and nonliving components of the system" (see DEIS/R 3.7-31). Despite these important factors, the EIS/R failed to analyze eutrophication and its impact to JTNP's ecosystem[.]

> The Agreement between NPS and Kaiser/MRC does not remedy the inadequacy of the EIS/R's assessments of impacts and mitigation measures. (See FEIS/R Appendix T for Agreement[.]) BLM mischaracterizes a side agreement ("Agreement") entered into between the polluters and NPS, and then cite [sic] said Agreement 30 times in response to NPS' concerns in defense of the adequacy of the EIS/R's analysis[.]

This concern about an increase in raven and "other scavenger populations" (unnamed) due to "roadkill" strikes me *from the record* as greatly exaggerated, and it suggests simply going down the list of usual environmental concerns and then manufacturing a groundless make-weight argument to try to inject eutrophication into this case.

Contrary to (1) the Charpieds' overblown concerns and claims, (2) the district court's mistaken view of this record, and (3) my colleagues' opinion, the BLM *did* examine eutrophication and determined-correctly so from the record-that it was *not* a serious issue. Here is what the IBLA had to say about the issue as raised by the Charpieds:

> "Eutrophication" is a process, associated with aging aquatic ecosystems such as lakes, whereby concentrations of phosphorus, nitrogen, and other plant nutrients increase, altering the ecosystem by algae blooms or microscopic organisms. "Cultural eutrophication" occurs when the aging

process is sped up by the activities of humankind by allowing excess nutrients in such forms as sewage, detergents, and fertilizers to enter the ecosystem. *Encyclopedia Brittanica,* Micropaedia Vol. III at 1007 (1979).

In the present context, NPS used the term "eutrophication" to refer to the addition of nutrients (in garbage and trash) to the desert ecosystem, raising the possibility that the ecosystem would be upset by the proliferation of animal life such as insects and rats. NPS requested that this possibility be examined in the EIS/EIR process. *NPCA II* at 29-30.

The Charpieds assert that BLM failed to adequately assess "impact of the dump adding a large volume of nutrients into an environment which has been nutrient scare for thousands of years." (Charpieds' SOR at 39-30.)

n.16

We must ... review each issue [including eutrophication] to determine whether the effects cited by the Charpieds are "relevant matters of environmental concern" or constitute "probable environmental consequences," such that BLM was required to present a "reasonably thorough discussion" of them as part of its requisite "**hard look**." The record shows that the EIS/EIR satisfies BLM's obligation to take a "**hard look**" at

such impacts.

. . . .

The EIS/EIR addressed "eutrophication" and roadkill. (Draft EIS/EIR at Sec. 4.7.4, ROD at 15; Final EIS/EIR at 7-22 to 7-24; Response to Comments 1-123 and 1-153.) The Charpieds fail to specify how this assessment is deficient and thus fail to meet their burden of showing error in BLM's review. Effects of night lighting were addressed. (Final EIS/EIR Sec. 6.6.)

To the extent that appellants fault BLM for not considering the possibility that mining of the site will resume at some point in the future, compounding environmental questions, this issue goes beyond presently foreseeable effects. BLM's approval of the Project is subject to ongoing monitoring to determine whether additional adverse impacts to the ecosystem eventuate.

NEPA is primarily a procedural statute designed "to insure a fully informed and well-considered decision." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). That is, although NEPA requires an agency to prepare an EIS where significant impacts are identified (as BLM did here), nothing in NEPA restrains an agency from proceeding with an action that will have significant

> impacts where it decides that other values outweigh the environmental costs. *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 350-51, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989); *Paul Herman,* 146 IBLA 80, 102 (1998). The purpose of preparing the EIS is to inform the agency of possible adverse environmental effects in hopes that the agency can mitigate them. This expectation was well rewarded in this case. As discussed herein, BLM did not disregard the adverse effects identified in its EIS/EIR, but proceeded to carefully consider them (as well as six other alternatives (ROD at 3)) and develop mitigating measures to reduce or eliminate them, in consultation with Departmental agencies responsible for the subjects presented. We find no basis to disturb its decision.

My colleagues register concern that eutrophication discussions are found only in scattered sections of the EIS and that one has to "cull through entirely unrelated sections of the EIS and then put the pieces together" to find them. They call this a "patchwork," and they find such to be a fatal flaw. All I can say is that (1) it was the Charpieds' burden to identify the failures they alleged, (2) the California Court of Appeal thoroughly examined and analyzed the eutrophication allegations in 1999 and had no trouble finding its way through the record, (3) I had no trouble finding eutrophication in this voluminous record, and (4) neither did the IBLA.

I note here that the DEIS contains an enormous,

detailed, and well-organized Table of Contents (with appendices) spanning 17 pages. Only someone intent on not finding what they hoped was not there could fail to locate matters of their concern in this admittedly gigantic document. But, the clear road map is there.

To save space, let's go to the Response to Comments section of the EIS:

> A commenter has stated that ecosystem impacts, such as eutrophication, are defined in the "broad sense, referring to the large-scale addition of nutrients (i.e., landfill trash) to the desert ecosystem" (Appendix 2 of Comment 1) and has requested that the EIS/EIR explain the impact of the proposed Project on the regional ecosystem, including impacts on "subtle and interconnected plants, animals, and processes, most of which presently are unknown." (NPS, Joshua Tree National Park Issues Identification for the Eagle Mountain Landfill Environmental Impact Statement/Environmental Impact Report, 1995). The JTNP Issues Identification paper also identified possible ecosystem impacts attributable to the Project (i.e., wet dry deposition of nitrate, global warming, and invasion of exotic species) and requested additional studies and experiments to assess ecosystem impacts. Upon review of the requested studies and experiments suggested by the NPS, the lead agencies determined that existing data were available and sufficient for assessing impacts to

biodiversity and ecosystem function. The Draft EIS/ EIR addresses all these possible impacts associated with the Project, including habitat loss, additional nutrients originating directly or indirectly from landfill material (defined as "eutrophication" by NPS), the introduction of exotic species, nitrate deposition, and global warming.

For example, the Draft EIS/EIR (Section 4.7.4) states that the proposed Project could affect biodiversity "primarily as a result of loss of habitat, habitat fragmentation, and changes in the relationship between species in the form of increases in predator/scavenger populations in response to increased food availability at the landfill site, and from increased roadkills." The EIS/EIR presents a full analysis and discussion of these impacts and appropriate mitigation, where applicable.

Control measures proposed to be implemented are described above in General Response 3, and include continuous covering of waste, limiting the work face to 2 acres or less, litter fencing, litter patrols, and providing additional cover for any area that has not been active for 180 days.

To control conditions at the Townsite that could also lead to an increase in predators, measures identified for predator control will also be employed at the Townsite. These measures will include educating Townsite residents of the factors that increase raven

and other predator populations, and restrictions requiring disposal of trash and garbage only in tightly closing trash receptacles. Areas around businesses will be patrolled regularly to collect trash. Feeding domestic animals outside in areas accessible to ravens will be prohibited. Buildings and other structures that could provide nest sites for ravens will be monitored regularly. Other restrictions on Townsite activities are described in Section 4.7 of the Draft EIS/EIR.

The mitigation measures proposed for the Project address potential impacts to a broad range of plants and animals that occur in the Project area. Mitigation measures have been identified, in consultation with the appropriate regulatory agencies, for potential impacts to all special status species, and will be implemented as a condition of Project approval. At the request of the [California Department of Fish and Game] and other resource agencies, additional mitigation measures will be implemented for species that have no protected status and/or are not anticipated to experience significant impacts. For example, the California Barrel Cactus is not a protected species, but is considered an important food and water source for Nelson's Bighorn Sheep, especially in time of drought. Mitigation for this species includes transplanting and monitoring to ensure the success of transplanting. Similarly, mitigation measures will be implemented for the Common chuckwalla, which has no

formal protected status. These will include surveying and removing individual animals from Project areas. The aggregate of the mitigation measures proposed for protected and other species will help assure that the biodiversity of the Eagle Mountain Project area is protected and maintained. The availability of the Environmental Mitigation Fund as a tool to acquire and protect prime habitats in the Southeastern California desert will further contribute to the protection of biodiversity and ecosystem function.

Environmental Mitigation Trust

A number of commenters requested additional detail about how the Draft Environmental Mitigation Trust (Appendix U of the Final EIS/EIR) would function and how it would contribute to the mitigation of Project impacts. The overall goals and functions of the Environmental Mitigation Trust, as currently proposed, are described on pages 4.7-14 of the Draft EIS/EIR. The Draft Trust includes elements of the negotiated Agreement with Kaiser/MRC and NPS and certain discussions with CDFG. Specifically, the Draft Trust specifies that 72 percent of the fees would be used to acquire lands that provide high-quality habitat for special status species in the region. In addition, 18 percent of the funds would be used for long-term monitoring, research, and mitigation. The remaining 10 percent of the funds would be used to acquire private parcels in JTNP and for long-term research and mitigation associated with potential

Project impacts to JTNP. Lands to be acquired would be identified by an advisory committee appointed by the Trustees of the Trust (the County of Riverside Board of Supervisors).

The Draft Trust agreement specifies that the nine members of the advisory committee shall all be residents of Riverside County and comprise two members of the Board of Supervisors of the County of Riverside; two citizens appointed by the Board of Supervisors, one of whom must be a Native American; two citizens nominated by the Coachella Valley Mountains Conservancy; one citizen nominated by The Nature Conservancy; and one citizen nominated by The Desert Protective Council. Because land acquisition expenditures would be recommended by this advisory committee, specific acquisition locations cannot be identified at this time. The Draft Trust Agreement, however, specifies that lands acquisition expenditures would be restricted to or for the benefit of lands within 15 areas in desert environments of Southern California identified in the Trust Agreement (with provisions for expenditures in other project areas if acquisition in the 15 identified areas have been reasonably met and with the consent of 4 of the 5 trustees). The 15 areas listed as priority areas for acquisition were identified in a January 1994 California Endangered Species Act Memorandum of Understanding between MRC and the CDFG.

Section 4.7.4 of the Draft EIS, "Biodiversity and Ecosystem Function," says:

The NPS has expressed concern that

operation of the landfill will result in eutrophication (increased primary productivity) at JTNP as a consequence of atmospheric nitrate deposition. Atmospheric nitrate deposition results from the emission and transport of anthropogenically generated nitrogen compounds. Sources include agricultural emission of ammonia/ ammonium and organic nitrogen from animal wastes and fertilizer applications, and oxides of nitrogen emitted from fossil fuel combustions (automobiles, power plants, industry) (Paerl, 1993). Recent studies indicate up to 30 kg/ha/yr of dry nitrate are deposited primarily from automobiles in the San Dimas Experimental Forest, just east of Los Angeles (Personal Communication, Kathy Freas/CH2M Hill with E. Allen. August 17, 1995).

Increasing nitrate deposition is of concern in desert ecosystems because desert soils typically are nutrient poor and primary production can be limited by nitrogen availability. Increased nitrogen could potentially allow the establishment and spread of plant species that otherwise would not occur in the desert because of nitrogen limitations. Sources of nitrate associated with the proposed Project are limited to fossil fuels used by trucks and trains delivering waste to the landfill and to the use of personal vehicles and home heating for occupants of the Townsite. Landfill gases include only methane and carbon dioxide and are not a

source for oxides of nitrogen. The small amounts of nitrate produced as a result of fossil fuel use associated with landfill operation would be eclipsed by the amount of nitrate produced in the Los Angeles Basin and in urban desert communities closer to the landfill. Additionally, nitrate is transported by prevailing winds, which are westerly in the vicinity of the proposed Project. Because the landfill is southeast of JTNP, nitrates generated from landfill operations would be transported away from JTNP rather than toward it. JTNP expects to see an increase in visitorship to the park to 4 million persons per year by the year 2010 (NPS, 1995). Many, if not most, of these visitors will arrive by automobile and will drive through the park. This source of nitrates from fossil fuel combustion is expected to be greater than that produced by landfill operations. Nitrate deposition associated with landfill operations, therefore, is expected to have no effect on ecosystem function [in] JTNP (see Section 4.4 Air Quality).

Then, there is the Agreement with the NPS covering ravens and other predators, which addresses any unanticipated predator and raven problems about which the Charpieds worry:

3.6 DESERT TORTOISE-Kaiser/MRC shall undertake the following obligations in connection with the Desert Tortoise:

3.6.1. Conduct and continue the existing

raven monitoring program from at least twelve (12) months prior to commencement of operation for a period of at least 10 years.

3.6.2. Conduct, beginning at least twelve (12) months prior to commencement of operation of the Project and continuing for a period of at least 10 years, a predator monitoring program at the Project.

3.6.3. Mitigate potential increases in raven, coyote, kit fox, and other predator populations caused by the presence of trash at the Project. If the Common Raven population in the region of the Project increases as a result of landfill activities, then an active control program will be instituted. Kaiser/MRC will present its control plan and depredation permits to NPS prior to start up of the landfill. If control measures are instituted, but found to be ineffective, Kaiser/MRC will revise its control plan and implement a new plan.

3.6.4. Fence the perimeters of all active landfilling and waste handling areas with fencing designed to exclude large scavengers and place a minimum of 6 inches of appropriate cover material over deposited and compacted refuse on a daily basis to minimize raven, rodent, and other opportunistic scavenging.

3.6.5. Conduct, upon commencement of landfill operations, a non-lethal predator

control program, that will, as a minimum include hazing at the landfill site, coyote and kit fox aversion (aversive conditioning) techniques, prompt *removal of road-killed wildlife* along access roads, and the possible use of bird repellent methyl anthranilate.

The California Court of Appeal had this to say in 1999 about eutrophication:

Eutrophication (Nutrient Addition)

In its ruling, the [Superior] court found insufficient evidence to support the EIR's conclusion that impacts to the Park will be less than significant regarding "the impact of the landfill on the biological resources of the [P]ark as a complex and interrelated system, which the [NPS] describes as eutrophication." In 1995, the Park staff requested that as part of the EIR process, the involved agencies study the phenomenon of adding nutrients (trash) to the dry, harsh desert landscape, possibly causing insects and rats to proliferate, then starting the food chain going full tilt and upsetting the Park ecosystem. (This phenomenon is termed eutrophication after the similar effects of adding nutrients to lakes and upsetting their ecosystems.) The Park recommended such studies as computer modeling and animal tracking (trapping rats and insects at existing landfills, and inventorying animal feces to analyze whether human-generated trash was being transported) for several years to project the

impact of the landfill, if it were to be built.

The EIR approached this problem in several ways, directed toward containment of the refuse: (1) The EIR proposed such measures as keeping incoming refuse in sealed containers until transported to a limited working area, creating litter fences, conducting a storm watch to avoid the scattering of materials by windstorms, and covering the waste with dirt and mining debris to avoid access by ravens. Similar measures have proved effective at other landfills. (2) The landfill will have a state-of-the-art liner and operations design as part of the system for confining the waste. (3) Studies were made of the Los Angeles experience with landfills, in which rats were fitted with radio transmitters and researchers found that daily landfill operations (bulldozing and compacting waste) kill rats. Other studies have shown that insects do not proliferate at landfills if daily cover is properly applied. (4) All ponds and water sources will be covered and the areas fenced to prevent access by predators such as ravens, coyotes, or kit foxes. (5) The proponents entered into the mitigation agreement with the NPS to provide for additional mitigation measures if necessary. (6) The EIR includes responses to comments, including the Park issues identification paper, stating that the lead agencies determined that existing data were available and sufficient to address impacts to

> biodiversity and ecosystem function. The EIR addresses such possible impacts from the project as "habitat loss, additional nutrients originating directly or indirectly from landfill material (defined as 'eutrophication' by NPS), the introduction of exotic species, nitrate deposition, and global warming." The comments give the example that biodiversity could be affected by " 'changes in the relationship between species in the form of increases in predator/scavenger populations in response to increased food availability at the landfill site, and from increased road kills.' "These impacts and appropriate mitigation were discussed in the EIR.

Nat'l Parks & Conservation Ass'n v. County of Riverside, 71 Cal.App.4th 1341, 84 Cal.Rptr.2d 563, 576 (1999). "It is speculative whether the eutrophication effect will occur, but if it does the NPS agreement provides for environmental mitigation measures to deal with the problems." *Id.* at 577.

In conclusion, my colleagues claim that "[t]his patchwork cannot serve as a 'reasonably thorough' discussion of the eutrophication issue" demonstrably and grossly mischaracterizes the record, and is flatly wrong. It inappropriately gives the back of this Court's hand to a massive and thorough process and resulting responsible environmental decisions and documents.

IV

HIGHEST AND BEST USE

The appellees now claim pursuant to the FLPMA that BLM's appraisal of the value of the federal land to be transferred to Kaiser for the landfill failed to consider the "highest and best use" of that property as part of the intended commercial landfill. Their untimely assertion is that BLM's selection of potential land uses for its highest and best use determination did not include the use as a landfill as one of its markers. *See* 43 C.F.R. § 2201.3-2(a)(1), (2). They argue that Kaiser is not paying enough for the federal lands it seeks to acquire.

A.

Failure to Exhaust

The first problem with this newly-minted claim is that the plaintiffs did not present it to the IBLA, as they were required to do pursuant to the jurisdictional doctrine of exhaustion. *Great Basin Mine Watch v. Hankins,* 456 F.3d 955, 965 (9th Cir.2006) ("The APA requires that plaintiffs exhaust administrative remedies before bringing suit in federal court. 5 U.S.C. § 704. This requirement applies to claims under NEPA."). I draw this conclusion from the Statements of Reasons for their appeal to the IBLA-one from the NPCA and one from the Charpieds.

First, the NPCA's Statement of Reasons for the appeal:

> II. **THE BLM WILL NOT RECEIVE FAIR MARKET VALUE FOR THE EXCHANGE.**

> Any disposal of federal land must be compensated at "fair market value of the use of public lands and their resources." 43 U.S.C.A. § 1701(a). Here, the compensation being offered in exchange for the public lands in question is inadequate, and egregiously low. As a part of the land exchange, BLM will hand over 3,481 acres of federal land just outside Joshua Tree, providing the bulk of lands needed by Kaiser for the proposed Landfill. In return, Kaiser will transfer 2,486 acres of private land to BLM. To compensate for the approximately 1,000-acre differential, Kaiser will also pay BLM a lump sum of $20,100, which is well below the fair market value. Kaiser anticipates huge profits from a landfill operation on the undervalued BLM land, well beyond the $20,000 amount that would be paid for approximately one third of the property. Here again, Kaiser and a few other parties will benefit at a significant cost borne by the national treasury.

As for specific defects in the method of evaluation, this is what NPCA said:

> Here, BLM's own analysis reveals its failure to incorporate wildlife and aesthetic value into the valuation of the federal lands. *An appraiser, in determining market value, "shall include historic, wildlife, recreation, wilderness, scenic, cultural, or other resource values."* 43 C.F.R. 2201.3-2(a)(3). Certainly, BLM land in close proximity to Joshua Tree

> (1.5 miles away) carries significant wildlife, wilderness, scenic, and cultural value to the one million yearly visitors to Joshua Tree. The land exchange appraisal prepared for BLM does not accurately reflect this value.

Nowhere does this statement with sufficient clarity identify as a flaw BLM's alleged failure to value its lands as part of a proposed landfill, nowhere does it use the term "highest and best use." The reason given is generic and not specific or particularized.

"[A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure references to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agencies' attention," seeking to attack it in court. *Vt. Yankee Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553-54, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). The purpose of the exhaustion requirement is two-fold. The requirement is designed (1) to "avoid [ ] premature claims," and (2) to "ensur[e] that the agency be given a chance to bring its expertise to bear to resolve a claim." *Great Basin Mine Watch*, 456 F.3d at 965 (quotation omitted). The NPCA's statement, vaguely alleging without explaining why the land was undervalued, serves neither of the twin objectives of exhaustion. The proof of this pudding is in the eating. Nowhere in the IBLA's decision is the valuation as a landfill "issue" addressed, and not because they overlooked it, but because the plaintiffs did not raise it. Everything the plaintiffs did raise *was* addressed.

The Charpieds' Statement of Reasons for the appeal is no better; in fact, it is worse. In what amounts to a 36-page jeremiad laced with invective and unsupported allegations of corruption, payoffs, and kickbacks against numerous individuals and all the agencies involved-including the Nature Conservancy-they attack everything in sight-*except* the BLM's choice of its appraiser's *method* of valuation. Again, no mention of a valuation-as-a-landfill deficiency, no use of the words "highest and best use," and no reference to the relevant valuation rules. Instead, we find statements like this: "We charge the California BLM with the under-value of the select public lands in their continual serving of preferential treatment to the developers, while ripping off the taxpayers." "The taxpayer is being swindled." "BLM lied...." "The U.S. Attorney advances 'lame contentions'...." "The BLM shamelessly extorts from the Constitution and the people [powers it doesn't have]." "Gee, some guys [like Kaiser] get all the breaks." "In short, the smooth talking polluters played Washington D.C. officials like a fiddle." "Payola." "If we haven't made ourselves clear, perhaps this is a good time to remind the [Administrative Law Judge] that this proposal stinks of back room deals, hidden agendas and intrigue, lacks any semblance of integrity or ethics in government, and is worthy of an Inspector General's investigation."

The only thing that is clear about this Statement of Reasons is that the Charpieds are against this proposal. They are not interested in a "**hard look**," only in stopping the project, period. Interspersed

between all the unproductive name calling, they raise every objection one might imagine-*except* the issue of "highest and best use" upon which they now attempt to prevail. Shades of *Vermont Yankee.*

Looking at the IBLA's opinion, one sees that the IBLA directly addressed *all* the objections the Charpieds and NPCA did raise. This fact underscores the wisdom of the exhaustion rule. If you raise it, the IBLA will examine and answer it. Again, I turn to the record:

> Section 206(b) of the FLPMA requires that the values of the public and private lands exchanged be equal or equalized by the payment (absent waiver in appropriate circumstances) of not more than 25 percent of the total value of the land transferred out of Federal ownership. 43 U.S.C. § 1716(b) (1994); 43 C.F.R. §§ 2201.3(a) and 2201.5(c)(2); *see Brent Hansen,* 128 IBLA 17, 19 (1993); *Havasu Heights Ranch & Development Corp.,* 102 IBLA 1, 7-8 (1988).
>
> The Charpieds assert that BLM undervalued the selected public lands taken by KEM in the exchange (Charpieds' SOR at 1-2), suggesting that it did not meet the requirements of 43 C.F.R. §§ 2201.3(a) and 2201.5(c)(2). NPCA also argues that BLM will not receive fair market value for the exchange. (NPCA SOR at 5-6). It is well established that a party challenging an appraisal determining fair market value is generally required to either show error in the

methodology used in determining fair market value or, alternatively, submit its own appraisal establishing fair market value. *See Voice Ministries of Farmington, Inc.*, 124 IBLA 358, 361 (1992); *High Country Communications, Inc.*, 105 IBLA 14, 16 (1988). Appellants have submitted no appraisal here. Nor have they shown error in the methodology of the appraisal. We accordingly do not agree that the public is not receiving full value for the selected public lands. In these circumstances, the BLM appraisal is properly upheld. *See, e.g., Brent Hansen,* 128 IBLA at 19; *City of Santa Fe (On Judicial Remand),* 120 IBLA at 315; *Burton A. McGregor,* 119 IBLA at 105.

We specifically reject the Charpieds' argument (SOR at 1) that BLM failed to properly value the reversionary interest in the tract of land they describe as the campsite/millsite lands. BLM instructed the appraisers to appraise the reversionary interest in the surface estate of the tract in terms of the "fee simple estate, disregarding the [e]ffect of any title encumbrances," including the reversionary interest, and to appraise the tract "as if in a raw, unoccupied state, disregarding any of the existing improvements." (Appraisal Report, Vol. II, at iv, 4, 14). The record indicates that these instructions resulted from an agreement between BLM and KEM which was designed to resolve the problem of how to appraise the reversionary interest, under which KEM

agreed to pay for the full fee simple title to the campsite/ millsite lands even though it already held the principal interest in those lands. (Letter to BLM from KEM dated May 5, 1993). The surface estate was patented to KSC in 1955 and was being held subject only to KEM's continued compliance with the terms of the patent. So long as it did so, KEM could hold the surface estate indefinitely, subject to the possibility of reverter. We find no fault with this compromise, and appellants have provided no basis to disturb it. To avoid even the possibility of undervaluing its reversionary interest, BLM instructed the appraiser to value that interest as if it were a fee simple interest in the surface estate of the land, that is, as if the reverter had occurred. This undoubtedly *increased* the value attributable to the reversionary interest, thus maximizing its value for purposes of the exchange and benefitting the United States by increasing the overall value of the selected public lands in the exchange.

We also reject the Charpieds' argument (Charpeids' SOR at 1) that, by disregarding revenue from improvements that have been built on the campsite/ millsite lands, BLM undervalued the reversionary interest. That argument disregards the critical fact that, if the lands ever had reverted to the United States, those improvements could be removed. Such improvements and associated "revenue stream" belong to KSR and its successors, not to the United States, which

has no claim to reimbursement for their value.

By the same token, the valuation of the offered private lands is not defective because it did not include the value of railroad tracks which cross the property (*see* Charpieds' SOR at 2), as those improvements will not belong to the United States following the exchange, but will remain in Kaiser's possession on the property under authority granted by the right-of-way. In these circumstances, it was appropriate to value the lands "as if in a raw, unoccupied state, disregarding any of the existing improvements," (Appraisal Report, Vol. III at 5, 23), as those improvements can be removed by the right-of-way holder.

The Charpieds assert that the appraisal misstates the present use classification of the selected public lands as "designated for Open Space and Conservation." (Charpieds' SOR at 1-2). We are unable to find such statement, and the Charpieds provide no citation. The appraisal Report expressly states to the contrary *that the selected public lands were "appraised based on [their] estimated highest and best use as if available in the open market,* in accordance with the underlying zoning regulations, County of Riverside General Plan land use recommendations, and [CDCA] Plan land use recommendations" (Appraisal Report Vol. I at 43-44), concluding, in view of the absence of "imminent development potential," that "the highest and

best use of the selected public lands is estimated to be holding for speculative investment and future capital appreciation." *Id.* at 47.

The Charpieds argue that the Notice of Exchange Proposal (NOEP) violated 43 C.F.R. § 2201.2(a)(1), because it failed to name Kenneth Statler as a party "involved in the present exchange." (Charpieds' SOR at 2). Appellants have failed to show that Statler, who apparently at one time held a leasehold interest in a portion of the campsite lands that has now expired, owns any interest in the lands involved in the exchange. Accordingly, we agree with KEM that he is not "involved in the present exchange" and need not have been identified under 43 C.F.R. § 2201.2(a)(1). Nor did the NOEP need to mention MWD (Charpieds' SOR at 20), which is not a participant in the exchange, but is instead the grantee of a right-of-way.

The Charpieds also argue that the NOEP violated 43 C.F.R. § 2201.2(a)(2) by not identifying 400 acres of desert tortoise habitat that KEM will donate to BLM. That "donation" is actually being made as mitigation for the expected loss of desert tortoise habitat caused by the widening of Eagle Mountain Road. We agree with KEM that it was not required to list those lands in the NOEP because, at the time of the preparation of that document, the extent of loss of habitat was not known and could not

have been accurately foreseen. At this time, KEM has committed itself (as a condition of the land exchange agreement) to purchase 400 acres of tortoise habitat and donate it to the United States for preservation to mitigate expected damage to 160 acres of tortoise habitat resulting from the widening of Eagle Road. We find nothing impermissible in that. The valuation of the selected public land and offered private lands are not affected. Public involvement in this process can await the execution of the agreement.

Both NPCA and the Charpieds argue that BLM erred by failing to take into account that title to the campsite/millsite lands had reverted to the United States because the terms of the reverter in the patent had occurred. Indeed, they presume that title to the lands has reverted and make further assumptions accordingly. *See, e.g.*, Charpieds' SOR at 2-3 (asserting that KEM's occupancy of these lands is trespass, and challenging the legality of a lease of surface rights issued by KEM to Statler). In view of the fact that BLM has agreed to deed its interest in the lands (whatever it may be) to KEM, this land exchange will resolve these questions once and for all. As noted above, BLM has valued the campsite/ millsite lands as if the land had already reverted to the United States. This moots the question of whether title to the lands has, in fact, reverted.

There is no doubt that the Charpieds were aware

of the precise "highest and best use" argument they chose not bring to the attention of the IBLA. They asserted this very same argument in earlier cases; *see, e.g., Donna Charpied*, 137 IBLA 45, 47 (1996). To quote the IBLA from that case,

> They [the Charpieds and others] contend that the appraisers *failed to consider that the Federal land to be exchanged is proposed to be used as a landfill, and that, as a result, the land should be ... valued in comparison to landfill sites*, instead of being treated as mine support lands....

Id. (emphasis added).

Notwithstanding their clear awareness of this "comparison" issue, the Charpieds did not raise it in this matter until they arrived in federal court, an acute violation of the exhaustion rule. Then, they finally hired their own appraiser-Stephen Roach-and offered to the district court new "evidence" on this new issue. Too late, fatally too late. NPCA recognizes this deficiency, claiming that to have raised this valuation issue to the IBLA would have been "futile." NPCA's Answering Brief at 56. Why futile? Because it did not work in the Charpieds' earlier case. In short, both decided not to pursue it here-but only the NPCA explains why.

B.

The Herzog Appraisal

Nevertheless, when they did insert this new issue

into the district court case, allegedly supported by an appraiser, Stephen Roach-who was never involved in the administrative process at all-BLM did what it would have done had it been given timely notice of this additional concern: they hired a *new* independent appraiser-Steven Herzog-to evaluate it. So much for futility. BLM instructed Mr. Herzog independently to review David Yerke's earlier 350 page appraisal "[i]n light of the *Desert Citizens* decision," referring to our opinion in *Desert Citizens Against Pollution v. Bisson,* 231 F.3d 1172 (9th Cir.2000). In that case, we held that the use of property should be "considered" in evaluating the highest and best use. *Desert Citizens,* 231 F.3d at 1180-84. The purpose of Mr. Herzog's report was to "supplement the administrative record."

Steven Herzog holds the designation of MAI from the Appraisal Institute. He is also a Certified General Real Estate Appraiser in California, a Registered Professional Forester, and the President of the Herzog Group. To assist him in this endeavor, he hired the Recon Research Corporation for its discount rate as applied to future income for landfill lands expertise, and EMCON, a civil engineering company with landfill experience.

Despite the Charpieds' fatally tardy assertion of this matter, Mr. Herzog did what BLM and *Desert Citizens* asked him to do: he thoroughly *considered* the value of the land in connection with its value as a landfill and filed his report accordingly. He concluded as of the relevant date that the landfill was "not a financially feasible use of the selected [federal] land." It follows that the "highest and best use" of the

federal lands being appraised could *not* have been for a landfill. He noted that as of 1993, "difficulties faced by landfill developers in obtaining required approvals impacted the ability and desire of companies to finance such projects." He pointed out that operators such as Waste Management, Inc., Western Waste, and BFI began to abandon their investments. He opined that "[t]he opportunity costs of investing tens of millions of dollars in a high-risk venture, without any return on that investment for at least ten years are enormous," and that "[a] knowledgeable investor with millions of dollars to invest would not have considered investment in a rail-haul landfill to be the route to obtaining a reasonable return on the investment."

So, if this is true, that there was no market for the federal lands as a landfill, why would Kaiser doggedly pursue this proposal? *Because Kaiser already owns the abandoned holes in the ground and the railroad necessary to serve it* and has a considerable investment in the project. The idea that someone else might purchase the selected federal lands for a landfill is palpably and demonstrably hallucinatory.

This is what Mr. Herzog has to say about Kaiser's determined motivation in a declaration provided to the district court summarizing his 108-page report (plus attachments) submitted to BLM:

> 61 . . . . Under this analysis, the net present value ["NPV"] of the income generated from the project would be $2.48 million. *Not* included in the calculation of this figure is

any allowance for entrepreneurial profit, the $13 million spent on permitting after September 25, 1997, the $17 million that would be required to upgrade the railroad and relocate and upgrade the paved road, or any allowance for on-site infrastructure cost and staffing. Consequently, the NPV for the net income to the landfill operation is dwarfed by the expenditures that would be required to obtain that income-a conclusion BFI obviously reached in 1994. Report pp. 106-107.

62. I reached the conclusion that, as of the effective date, landfill use was not financially feasible. Yet, Kaiser and its remaining associated investors went on to spend $13 million more pursuing final permits. Through 1994, approximately $49 million had been spent on the project. However, BFI had spent $45 million of that, and walked away. The remaining proponents had only $4 million invested, but the only way to recover any of the investment was to press on with the permitting effort. The internal dynamics of the stakeholders in the endeavor created a situation where motivations existed that were different from what a single entity, which had been solely financing the project from the beginning, would have faced. Report p. 108.

63. In addition, the expectation constantly existed that the time when final permits would be obtained was near at hand. The obtaining of the goal always seemed to be

near enough that continued expenditures were justified. To stop the process would have meant the forfeiting of all prior expenditures, because the final permits were needed to put the project in its most marketable condition. As noted earlier, the pending sale is contingent upon final permits being obtained and all litigation being resolved. Report p. 108.

64. The conclusion of Mr. Roach that a landfill was economically feasible is based completely on the observation that Kaiser was investing in a landfill at the site. First, this "observation" is not a proper method of assessing the economic feasibility of a landfill use. See definition of economic feasibility at ¶ 11. Moreover, this "observation" does not consider the circumstances and history of Kaiser's investment in the project or the fact that Kaiser, since it owned the railroad, the permits, and other aspects of the project related to the selected lands, had different motivations than others in the marketplace would have had. Mr. Roach's conclusion appears to be without market support, and is based on an incomplete understanding of the factors motivating Kaiser to continue to invest in Eagle Mountain.

Kaiser is correct when it argues that BLM's chief state appraiser in California, Nancy Ortiz, reviewed Mr. Herzog's report and said in a 12-page report:

From my review it appears that Mr.

> Herzog has been conscientious in providing an independent analysis and his report meets applicable [UAS] and Federal standards and **the requirements of the instructions for the assignment provided by the BLM. He has thoroughly analyzed the subject's potential for landfill as a highest and best use, using appropriate methods and consultants, and provided a feasibility conclusion based on his analysis. As the reviewer, I believe that the appraiser has addressed concerns relative to the landfill as a potential highest and best use....**

The BLM District Manager added this perspective to Mr. Herzog's appraisal:

> We feel the administrative record supports BLM's decision in this case, and disagree with Plaintiff's assertions to the contrary. However, in light of the Ninth Circuit's opinion in Desert Citizens, we felt an independent analysis of whether a landfill was the highest and best use of the federal lands was justified. We were prepared to accept the results of this new analysis, regardless of its implications to the District Manager's decision of September 25, 1997.

In conclusion, he said, "I have reviewed Mr. Herzog's report and found nothing which indicates that it is necessary to revise or revisit the District Manager's decision of September 25, 1997 approving the exchange." This decision was served on the Charpieds in January, 2003; and Mr. Herzog's report, plus the

reports of the chief appraiser and the district manager were formally made part of the administrative record and officially certified and lodged as such with the district court on February 7, 2003. How my colleagues can claim that this is not a "final, appealable decision" is a mystery.

Did the plaintiffs timely appeal the District Manager's final conclusion to the IBLA, as they could have pursuant to 43 C.F.R. § 4.410(a)? No. This failure alone should bar them from bringing it sideways into this case. So what the Charpieds say BLM did not do *has in fact been done,* and remains unchallenged by them.

We faced a similar problem in *Warm Springs Dam Task Force v. Gribble,* 621 F.2d 1017 (9th Cir.1980). In that case, a deficiency in the Army Corps of Engineers NEPA process had been cured during litigation. Calling these "supervening events," we denied remand to the Corps because the Corps had already conducted studies definitively to answer the matter at issue. *Id.* at 1026. As we said in *Friends of the Clearwater v. Dombeck,* 222 F.3d 552, 560 (9th Cir.2000), "if extra-record evidence shows that an agency has rectified a NEPA violation after the onset of legal proceedings, that evidence is relevant to [what] relief should be granted." *See also Forest Guardians v. U.S. Forest Serv.,* 329 F.3d 1089, 1095-96 (9th Cir.2003). At the very least, we should follow this example. BLM has done what we suggested in *Desert Citizens.* It has thoroughly "considered" the issue and issued a manifestly defensible answer. To remand at this point is a clear exercise in blind form over substance.

CONCLUSION

I end with the Technical Advisory Panel's evaluation: "the proposed Eagle Mountain Landfill could well become one of the world's safest landfills and a model for others to emulate." Don't hold your breath.

APPENDIX B
District Court Opinion

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA -
EASTERN DIVISION

DONNA CHARPIED, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	ED CV 99-0454 RT (Mcx) ED CV 00-0041 RT (Mcx) ORDER (1) GRANTING IN PART AND DENYING IN PART PLAINTIFFS DONNA AND LAWRENCE CHARPIEDS' ("CHARPIEDS') MOTION FOR SUMMARY JUDGMENT IN CASE NO. ED CV 99-0054 RT (Mcx); (2) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR . SUMMARY JUDGMENT IN CASE NO. ED CV 99-0054 RT (Mcx); (3) GRANTING IN PART AND DENYING IN PART PLAINTIFF NATIONAL PARKS AND CONSERVATION ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT IN CASE NO. ED CV 00-0041 RT (Mcx); (4) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT IN CASE NO. ED CV 00-0041 RT (Mcx); (5) ENJOINING DEFENDANTS FROM CERTAIN ACTION; (6) REMANDING BOTH ACTIONS TO THE BUREAU OF LAND MANAGEMENT FOR PROCEEDINGS CONSISTENT WITH THIS ORDER; AND (7) RESERVING JURISDICTION
NATIONAL PARKS AND CONSERVATION ASSOCIATION, Plaintiff, v. BUREAU OF LAND MANAGEMENT, et al., Defendants.	

The court, Judge Robert J. Timlin, has read and considered plaintiffs Donna Charpied and Lawrence Charpied ("the Charpieds"), the Desert Protection Society, the Center for Community Action and Environmental Justice, and the National Parks and Conservation Association ("NPCA") (collectively, "Plaintiffs")' motions for summary judgment with respect to the Charpieds' Second Amended Complaint ("SAC") and the NPCA's First Amended Complaint ("FAC"),[1] defendants U.S. Department of the Interior ("DOI"), Bureau of Land Management ("BLM"), Kaiser Eagle Mountain, Inc. ("Kaiser"), and Mine Reclamation Corporation ("MRC") (collectively, "Defendants")' joint motion for summary judgment with respect to the Charpieds' SAC and the NPCA's FAC, and all opposition and reply papers. Finally, the Court has considered the underlying administrative record. Based on such consideration, the court concludes as follows:

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[1] 'The Charpieds' SAC and the NPCA's FAC seek review of the same BLM administrative actions. Although no motion for consolidation was ever brought in these actions, pursuant to stipulation of all parties and by order of this court, the parties briefed at the same time the issues presented by both the Charpieds' SAC and the NPCA's FAC. This order on the parties' respective summary judgment motions, therefore, is dispositive as to both the Charpieds' action (ED CV 99-0454 RT (Mcx)) and the NPCA's action (ED CV 00-0041 RT (Mcx)).

I.

BACKGROUND

The Charpieds filed a Second Amended Complaint ("SAC) against Defendants DOI, BLM, National Park Service ("NPS"), Gale Norton, Secretary of the DOI, Kathleen Clarke, Director of BLM, Mike Pool, California State Director of BLM, Linda Hansen, Acting California Desert District Manager of BLM, Fran Mainella, Director of NPS, Kaiser and MRC alleging violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701, *et seq-** the National Park Service Organic Act, 16 U.S.C. § 1, *et seq.*, and the California Desert Protection Act, 16 U.S.C. § 410aaa-21, *et seq.*, and seeking declaratory and injunctive relief, as well as attorneys' fees and costs.

The NPCA filed a First Amended Complaint ("FAC") against Defendants DOI, Kaiser and MRC alleging similar violations and seeking the same type of relief.

II

UNCONTROVERTED MATERIAL FACTS

The following facts are uncontroverted material facts supported by admissible evidence:

Eagle Mountain Landfill and Recycling Center Project ("Project") is a "Class III non-hazardous solid

waste landfill" proposed on the site of an unreclaimed, inactive open-pit iron ore mine owned by Kaiser and leased to MRC. The proposed Eagle Mountain Landfill site comprises approximately 4,654 acres, of which about 2,164 acres will be used for disposal of waste. The inactive mine consists of four large open pits, each approximately one to two miles long, three of which will not be part of the Project and, therefore, will not be reclaimed in any manner by the Project. As part of the mining operation, Kaiser developed a 52-mile long privately owned rail line connecting the mine site to the main line of the Southern Pacific Railroad.

The mine is located in Riverside County, California ("the County").

The mine is bordered on the north, west, and southwest by the Eagle Mountains and on the east and southeast by the Chuckwalla Valley. The southern and eastern boundaries of Joshua Tree National Park ("Joshua Tree") are, in certain places, less than two miles from the mine.

Joshua Tree contains unusual desert plants and animals and spectacular geologic features, is part of an International Biosphere Reserve, is designated as a Class I airshed under the federal Clean Water Act, and provides important habitat for bighorn sheep, desert tortoises, deer, coyotes, bobcats, mountain lions, and a wide range of birds and reptiles.

The vast majority of Joshua Tree's 794,000 acres is designated or being managed as wilderness areas.

BLM is authorized to dispose of public lands by exchange under Section 206(a) of FLPMA.

In 1989, Kaiser submitted an application to BLM for a land exchange to facilitate the construction and operation of the Eagle Mountain Landfill.

Because the proposed landfill also required approvals from the County, Kaiser filed applications with the County on or about June 8,1989, requesting the necessary local approvals for the landfill, including zoning change, a specific plan of land use, and an amendment to the comprehensive general plan.

The land exchange was a "major Federal action having a significant impact on the quality of the human environment" under NEPA. Thus, BLM prepared an Environmental Impact Statement ("EIS") pursuant to 42 U.S.C. § 4332(2)(C).

The County and BLM worked together to prepare a joint Federal ElS/California State Environmental Impact Report ("EIS/EIR"). In 1992, the BLM and the County issued a Joint Final EIS/EIR analyzing the environmental effects of the landfill project.

During the preparation of the 1992 Final EIS/EIR, NPS expressed concerns about the impact of the Project on Joshua Tree. On or about July 26,1994, the California Superior Court for the County ("State Court") found the 1992 Final EIS/EIR deficient under the California Environmental Quality Act ("CEQA") and ordered that the County vacate its permits and prepare a new EIR. On or about March

10, 1995, BLM requested that the Interior Board of Land Appeals of the DOI ("IBLA") IBLA remand the matter to BLM in order to give it jurisdiction to enable it to join the County in preparing a new EIS/EIR. On or about April 27,1995, IBLA granted BLM's request, vacated the Record of Decision ("ROD"), and remanded the matter to the BLM. On or about May 12,1995, BLM asked the NPS to be a "cooperating agency" in the preparation of the new EIS/EIR and NPS agreed to so act on or about June 20,1995.

On or about April 10, 1996, BLM requested an updated independent appraisal of the land to be exchanged and the reversionary interest held by the United States in land patented to Kaiser in 1955.

On or about June 14,1996, NPS provided BLM with follow-up comments on the Draft EIS/EIR.

On or about September 25,1996, David Yerke completed his updated independent appraisal of the land to be exchanged, including the reversionary interest held by the United States in land patented to Kaiser in 1955.

In January, 1997, BLM approved the 900-page final EIS/EIR.

On or about April 28,1997, BLM approved the updated independent appraisal. BLM concluded that the updated appraisal met all applicable standards and accurately reflected the value of the selected public lands and the offered lands.

On September 25,1997, BLM's California Desert District Office Manager Henri R. Bisson issued a ROD approving the land exchange between Kaiser and BLM and announcing a final decision issuing the two rights-of-way to Kaiser would be withheld "pending receipt and review of any protest to the land exchange."

On December 9,1998 the California State Director, BLM approved the issuance of the two rights of way.

On or about January 11,1999, the Charpieds and NPCA noticed their appeal to the IBLA from BLM's denial of their protests to the land exchange, and challenged BLM's decision to grant certain rights-of-way.

On September 30,1999, the IBLA Administrative Judge David L. Hughes issued an opinion denying the appeals of the Charpieds and NPCA and affirming the BLM land exchange and BLM's approval of the rights-of-way.

In October 1999 the subject land exchange was effectuated by the filing of grant deeds with the County Recorder.

III.

ANALYSIS

A. Subject Matter Jurisdiction

Defendants contend that this court does not have subject matter jurisidiction over the instant action

because (1) Plaintiffs have failed to exhaust their administrative remedies, and (2) Plaintiffs have failed to seek judicial review of the proper administrative decision.

1. Exhaustion of Administrative Remedies

a. FLPMA Claim

Defendants contend that Plaintiffs have failed to exhaust their administrative remedies with respect to their FLPMA claim. Specifically, Defendants assert that Plaintiffs are barred from urging that a landfill should have been considered as the highest and best use of the exchanged lands because that contention was not first presented to the IBLA.

Defendants' position is without merit. In its brief on appeal to the IBLA, NPCA stated the following:

> Any disposal of federal land must be compensated at "fair market value of the use of public lands and their resources." 43 U.S.C.A. § 1701 (a). Here, the compensation being offered in exchange for the public lands in question is inadequate, and egregiously low. As part of the land exchange, BLM will hand over 3,481 acres of federal land just outside Joshua Tree, providing the bulk of lands needed by Kaiser for the proposed Landfill. In return, Kaiser will transfer 2,486 acres of private land to BLM. To compensate for the

> approximately 1,000-acre differential, Kaiser will also pay BLM a lump sum of $20,100, which is well below the fair market value. Kaiser anticipates huge profits from a landfill operation on the undervalued BLM land, well beyond the $20,000 amount that would be paid for approximately one third [sic] of the property. Here again, Kaiser and a few other parties will benefit at a significant cost borne by the national treasury.

AR 06033. The court concludes that the above language sufficiently presented to the IBLA the claim that a landfill should have been considered as a highest and best use of the exchanged lands, because it gave the IBLA the opportunity to consider the identical issue brought before this court. *See Kern v. U.S. Bureau of Land Management*. 38 F.Supp.2d 1174,1180 (D.Or. 1999), *rev'd on other grounds*, 284 F.3d 1062 (9th Cir. 2002).

Further, whether the issue was presented to the IBLA by only one plaintiff is inconsequential. So long as an issue is raised by *some* party at the administrative level, it can be raised by another party on judicial review. *See Id.* at 1180 ("[s]o long as the agency properly had the opportunity to consider the objection, it has no reason to challenge the bringing of such objection before the a court by another party."); *see also Buckeye Cable Vision v. U.S.*, 438 F.2d 948, 951 (6th Cir. 1971) (so long as agency "had an opportunity to consider the identical issues in [the] case but which were raised by other

parties,... it was not necessary for [plaintiff] to raise them again before the [agency].")

Finally, the court notes that it is not necessary for Plaintiffs to have presented to the IBLA every issue before this court, so long as the issue was raised at some point during the administrative process. Defendants' reliance on *Marathon Oil Co. v. United States*, 807 F.2d 759 (9th Cir. 1986), is misplaced. Contrary to Defendants' assertion, *Marathon Oil* does not support the proposition that all issues presented to this court must have been first presented to the IBLA. *See Id.* at 767 (finding issue not properly preserved because appellant failed to raise the issue at *any* point during the administrative process: "[Appellant] failed to raise the issue during the public hearing *or* during the 30-day comment period *or* in its appeal from the initial order" (emphases added)).

For the aforementioned reasons, the court concludes that Plaintiffs properly exhausted their administrative remedies with respect to their FLPMA claim.

b. NEPA Claim

Defendants also contend that Plaintiffs have failed to exhaust their administrative remedies with respect to their NEPA claim.

As discussed above, Plaintiffs need only have raised the NEPA issues it now raises before this court at *some* point during the administrative process. The record reflects that Plaintiffs first raised all of the NEPA issues before this court during the

administrative process. *See* AR 50290 (eutrophication); AR 6063-6064 (noise); AR 6064-6065 (night lighting); AR 6066 (visual impacts); AR 6064,6074 (desert tortoises); AR 19076 (groundwater); AR 6067 (air quality); AR 6074-6075 (Bighorn sheep).

Therefore, the court concludes that Plaintiffs properly exhausted their administrative remedies with respect to their NEPA claim.

2. Appeal of BLM Decision

Defendants further contend that the decision of the BLM, of which Plaintiffs seek judicial review, is not a final agency decision under the federal Administrative Procedures Act ("APA"), and therefore not subject to review by this court.

Under the APA, the only agency decision that is subject to judicial review is the final agency decision. An ROD issued by an administrative agency constitutes final agency action for purposes of the APA. *See, e.g., Sierra Club v. Slater*. 120 F.3d 623, 631 (6th Cir. 1997), *accord, Oregon Natural Resources Council v. Harrell*. 52 F.3d 1499,1504 (9th Cir. 1995).

In *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172 (9th Cir. 2000), plaintiffs challenged under the FLPMA a BLM decision to enter into a land exchange with a private party. In reviewing the district court's order, which dismissed the action on the ground that plaintiffs lacked standing and, in the alternative, denied the motion for preliminary

injunction, the Ninth Circuit stated that plaintiff was appealing from the BLM's decision, and not from the decision of the IBLA:

> [Plaintiffs] initially pursued administrative remedies. Upon dismissal of the action by BLM's State Director, the environmental groups jointly appealed to the [IBLA] and petitioned for a stay pending appeal. IBLA rejected the consolidated appeals and the request for a stay. [Plaintiffs] brought the instant case under the APA... [T]he complaint... alleged that the land exchange was arbitrary, capricious and *an abuse of BLM's discretion and exceeded the statutory limitations on BLM's authority* [emphasis added] to exchange public lands under FLPMA. [Plaintiffs] requested . . . *that the ROD approving the exchange be declared unlawful and set aside* [emphasis added] by the district court. In addition, the complaint requested preliminary injunctive relief prohibiting BLM . . . from taking any further steps to complete the exchange based on the ROD.

Id. at 1175. The opinion does not indicate that the Ninth Circuit or the district court reviewed the decision of the IBLA.

Moreover, appeal from a "final agency decision" is a prerequisite for subject matter jurisdiction under the APA. Lack of subject matter jurisdiction may be raised by any party at any stage of federal litigation, including on appeal. *See Morongo Band of Mission*

Indians v. California State Board of Equalization. 858 F.2d 1376, 1380 (9th Cir. 1988); *see also Attorneys Trust v. Videotape Computer Products, Inc.*, 93 F.3d 593, 594-595 (9th Cir. 1996). Subject matter jurisdiction may also be raised by both the district courts *and* appellate courts *sua sponte*. *See Morongo Band of Mission Indians*, 858 F.2d at 1380. ("The fact that none of the parties contests the district court's jurisdiction does not... relieve us of our responsibility to determine whether the exercise of jurisdiction was proper."); *see also Jenkins v. McKeithen*, 395 U.S. 411,421, 89 S.Ct. 1843,1849 (1969).

Because the court in *Desert Citizens* 1) stated that plaintiff requested, *inter alia*, that the ROD approving the exchange be declared unlawful and set aside, and 2) did not raise the issue of subject matter jurisdiction *sua sponte*, this court construes the Ninth Circuit's decision in *Desert Citizens* to review the BLM's ROD and *not* the decision of the IBLA supports the proposition that a BLM ROD is a "final agency action" under the APA, subject to review by district courts.

Therefore, this court concludes that it has subject matter jurisdiction over Plaintiffs' FLPMA and NEPA claims, and will address the merits of each claim.

C. Summary Judgment

Under Rule 56(c) of the Federal Rules of Civil Procedure, a district court may grant summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together

with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Plaintiffs and Defendants have filed cross-motions for summary judgment. However, as more than one court has noted, "[w]hen acting as a court of appeal [under the APA], it is improper for a district court to use methods and procedures designed for trial." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560,1564 (10th Cir. 1994); *see also Lodge Tower Condominium v. Lodge Properties, Inc.*, 880 F.Supp. 1370,1374-75 (D.Colo. 1995). As the court in *Lodge Tower Condominium* explained:

> Because a district court's function in reviewing administrative action is different from the function it usually performs as a trier of fact, some of the procedures designed to prepare a case for trial do not work well when the court is reviewing agency proceedings. Specifically, a motion for summary judgment under [R]ule 56 of the Federal Rules of Civil Procedure . . . makes no procedural sense when a district court is asked to undertake judicial review of administrative action. Such a motion is designed to isolate factual issues on which there is no genuine dispute, so that the court can determine what part of the case must be tried to the court or a jury. ... Agency action, however, is reviewed, not tried.

Lodge Tower Condominium, 880 F.Supp. at 1374 (citations omitted).

Accordingly, this court will construe Plaintiffs' motions for summary judgment under Rule 56 as motions to set aside the BLM's ROD and all actions taken in furtherance thereof including the approval and acceptance of the Final EIS/EIR and to remand this proceeding to the BLM with directions to take action consistent with this court's eventual disposition. Conversely, this court will construe Defendants' motions for summary judgment as motions to uphold the BLM's ROD and its approval and acceptance of the Final EIS/EIR.

D. Standard of Review

This action is brought pursuant to the APA, which provides for judicial review of agency actions. 5 U.S.C. § 702. Under the APA, an agency's action may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The reviewing court must consider whether the agency acted within the scope of its legal authority, adequately explained its decision, based its decision on facts in the record, and considered the relevant factors. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360,378,109 S.Ct. 1851,1861 (1989); *Western Radio Services Co. v. Espy*, 79 F.3d 896,900 (9th Cir. 1996). The reviewing court may not substitute its judgment for that of the agency. *Marsh* at 376,109 S.Ct. at 1860.

E. FLPMA Claim

The Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1716, requires the BLM, as part of the land exchange process, to: (a) make a determination that the public interest will be well-served by the land transfer, and (b) find that the lands to be exchanged are of equal value, taking into consideration any cash included as part of the exchange. *Id.*

1. Public Interest

In determining the public interest, the Secretary of the Interior ("Secretary") is to "give full consideration to better Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife...," and generally compare the value and objectives of the land in federal ownership with the value and objectives of the land in private ownership, if acquired. 43 U.S.C. § 1716(a) ("Section 1716(a)").

Section 1716(a) is explicit: the Secretary is required to give "full consideration" to certain needs of the Federal and State governments, as well as local people. However, the statute does not explain the meaning of "full consideration," Further, the parties do not cite, and this court is unable to find any judicial authority which construes the meaning of "full consideration." It is therefore the task of this court to determine if the BLM, as evidenced by the

ROD, gave "full consideration" to relevant statutory factors, as that term is used in Section 1716(a).

The BLM's ROD is lengthy. Of particular relevance is Section 4.0, entitled, "Management Considerations." AR 19068. The section begins with the director's conclusions:

> Based upon careful examination of the EIS/EIR, Federal comment, and after consultation with the NPS/JTNP, Biological Resources Division U.S. Geological Survey, the County of Riverside, and other appropriate Federal, State agencies, and local government agencies, I have concluded that the proposed action is consistent with BLM management goals and complies with FLPMA.... It is my determination that the acquisition of non-Federal land exceeds the values of Federal lands and interest to be conveyed. I also find that the use of the conveyed lands subject to mitigation and monitoring described in the EIS/EIR will not significantly conflict with established management objectives on adjacent Federal lands and nearby Federal lands.

AR 19068. The section goes on to highlight eighteen specific factors that the director considered in making his decision. AR 19068-19083.

Defendants contend that the public interest determination "considered all of the relevant factors and fell well within the range of discretion allowed

under FLPMA." The court concludes, however, that the ROD does not evidence that the BLM gave such factors "full consideration," as required by Section 1716(a). Rather, the BLM focuses mostly on mitigation, rather than taking a hard look at the environmental impacts of the land exchange, of the rights of way grants and the reversionary interest grants (hereinafter "land interest grants") and the planned landfill. For example, the BLM discusses acquiring 400 acres of desert tortoise habitat for mitigation of impacts caused by the Project. AR 19068. Additional mitigating measures discussed are portable litter fences, litter patrol, and minimization of the landfill face, AR 19073. However, in the discussion of these and other mitigation measures, there is no full analysis of the overall impact of the landfill. Where the record relates to impact on the wilderness experience, the BLM vaguely states that the Project "can" have an adverse impact on an individual's wilderness experience, but that the wilderness experience is subjective. AR 19073. Such language does not evidence "full consideration" as required under Section 1716(a).

As they do throughout their motions for summary judgment, Defendants contend that the IBLA decision is the final order from which judicial review is proper under the APA and that the IBLA properly upheld the BLM's determination that the public interest is well served by the completion of the land exchange and land interest grants.

As discussed above, the Ninth Circuit has concluded that the BLM's ROD is a final agency decision for purposes of the APA. Furthermore, even

if the IBLA's decision were the decision from which judicial review was proper, the court would reach the same conclusion, as the IBLA engaged in the same insufficient, conclusory analysis as the BLM. For example, the IBLA states:

> It is clear that, in assessing whether the "public interest" may be "well served" by completing the exchange, the use to which the selected public lands will be put by the private party is an important concern. The present case is a good example, where, as a result of granting the exchange, municipalities will have landfill capacity into the next century. This is in addition to the more direct benefit whereby habitat for protected species will be preserved in public ownership.

AR 50179. While "landfill capacity" and "habitat for protected species" are benefits of the proposed land exchange, whether such benefits outweigh the potential detriments is an issue that is addressed only conclusorily. Although Defendants may have addressed all of the relevant factors, both the BLM's ROD and the IBLA's decision do not evidence a serious balancing of such factors in a substantial comparative analysis.

Further, the use of "magic words" is not dispositive. For purposes of judicial review, *what* a federal agency ultimately concludes with respect to a particular project is less important than *why* it so concluded. It is impossible for a court to engage in meaningful judicial review under the APA unless the

federal agency at issue explains the bases for its conclusions. The BLM explanations of its conclusions as to public need are severely deficient. Accordingly, these actions will be remanded to the BLM with directions to 1) fully consider whether the proposed land exchange is in the public interest, and 2) fully articulate the factors it considered and the reasons for its conclusion.

2. Equal Value

To ensure that lands to be exchanged are of equal value, Section 206(d) of the FLPMA directs the Secretary to obtain and consider an appraisal of the affected lands' market value.

An appraisal prepared for land exchange purposes must contain certain information in order to comply with the regulations. The regulations require that the appraisal contain, among other things, an analysis of the "highest and best use" of the properties to be exchanged. "Highest and best use" is defined as the most probable legal use of the property, based on market evidence as of the date of valuation, expressed in an appraiser's supported opinion. 43 C.F.R. 2200.0-5(k). Before it can be concluded that any use for the property is its highest and best use, the use must be "physically possible, legally permissible, financially feasible" and "result in the highest value." *Desert Citizens Against Pollution*, 231 F.3d at 1181. While uses that are merely speculative or conjectural need not be considered, uses that are "reasonably probable" *must* be analyzed as a *necessary* part of the highest and best use determination. *Id.*

The regulations also require that an appraisal contain an estimate of "market value," which is defined as the most probable price in cash, or terms equivalent to cash, that lands or interests in lands should bring in a competitive and open market under ail conditions requisite to a fair sale, where the buyer and seller each acts prudently and knowledgeably, and the price is not affected by undue influence. 43 C.F.R. 2200-5(n). In estimating the market value of the land, the regulations further require that the appraiser: (1) determine the highest and best use of the property to be appraised, and (2) estimate the value of the lands and interest as if in private ownership and available for sale in the open market. 43 C.F.R. 2201.3-2(a)(1)-(2).

Plaintiffs contend that BLM's approval of the land exchange was arbitrary and capricious, an abuse of discretion and not in accordance with the law because the appraisal upon which it relied "flagrantly undervalued" the public lands to be exchanged in violation of federal law. Specifically, Plaintiffs contend that BLM failed to consider (1) the lands' "intended use" as a landfill, and (2) "the income generating value of the campsite/millsite lands as used for state prison and associated purposes" when determining its market value, resulting in an exchange where "the value of the public lands conveyed... greatly exceeded the value of the private lands acquired."

Defendants contend that (1) although BLM did not consider a landfill as a potential highest and best use, BLM nevertheless properly determined the "highest and best use" of the public lands, and (2)

BLM's determination of the lands' market value was proper.

Both of Defendants' contentions are without merit. The court concludes that BLM's failure to consider an income producing landfill as a potential highest and best use was an abuse of discretion, given that evidence available prior to the undertaking of the appraisal indicated that the selected lands were expected to be used for landfill purposes. *See Desert Citizens Against Pollution*, 231 F.3d at 1181. First, as in *Desert Citizens*, "the use of the land as a landfill was not only reasonable, it was the specific intent of the exchange that it be used for that purpose." *Id.* at 1184. Second, substantial steps had been taken to turn the selected lands into a landfill. Specifically, as early as 1989, Kaiser had proposed the construction and operation of the Eagle Mountain Landfill, and had filed applications with Riverside County requesting the necessary local approvals for the landfill, including zoning change, a specific plan of land use, and an amendment to the comprehensive general plan. Despite this, the appraisal expressly stated that it did not take into consideration such use *or* the potential value of such use. *See* Appraisal, Vol. I, p. 5: AR 52:34645; Appraisal, Vol. I, p. 43: AR 52:34683 ("The opinions of value expressed within this appraisal report do not take into consideration any aspects of the proposed landfill project."); *see also Desert Citizens Against Pollution*, 231 F.3d at 1182 ("It is especially noteworthy that a section of the [appraisal] fully acknowledged the likelihood of the future landfill, noting: "Currently, there are plans for the mine to become part of a major landfill facility that will serve

primarily the Los Angeles basin." ... The fact that [such] information was included in the appraisal report but was not addressed in the section dealing with highest and best use is particularly troubling.")

Defendants' second contention, that BLM's determination of the lands' market value was proper irrespective of the failure to consider its value as a landfill, is equally without merit. As discussed above, the appraiser is first required to determine the highest and best use of the property, then appraise the property as if in private ownership and available for sale in the open market. Defendants do not cite, and this court is unable to find, any support for the proposition that an appraiser does not have to properly determine the highest and best use of the property if, as Defendants contend, "it would not alter the 'conclusions' of the appraisal, [or] BLM's decision to transfer the property."

For the reasons stated above, the Court concludes that BLM's ROD was arbitrary, capricious, an abuse of discretion and not in accordance with law and will grant Plaintiffs' motions for summary judgment and deny Defendants' motions for summary judgment as to the FLPMA claim.

F. NEPA Claim

NEPA requires federal agencies to prepare an environmental impact statement ("EIS") for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) ("Section 4332(2)(C)"). Under

Section 4332(2)(C) all agencies of the Federal Government shall:

> include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on –
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

A challenge to the adequacy of an EIS is reviewed under the "rule of reason" to "determine whether the agency has engaged in a 'reasonably thorough discussion of the significant aspects of probable environmental consequences.'" *American Rivers v. FERC*, 201 F.3d 1186,1195 (9th Cir. 2000) (quoting

Oregon Natural Resources Council v. Lowe, 109 F.3d 521,526 (9th Cir. 1997)). Under this standard, once a reviewing court is "satisfied that a proposing agency has taken a hard look at a decision's environmental consequences, [its] review is at an end." *Idaho Conservation League v. Mumma*, 956 F.2d 1508,1519 (9th Cir. 1992). Considerable deference must be accorded to the agency with regard to the manner in which it examines the environmental consequences of a project. *Morongo Band of Mission Indians v. Federal Aviation Administration*. 161 F.3d 569,573 (9th Cir. 1998).

Plaintiffs contend that the Defendants EIS violated NEPA "because it failed to adequately address [the land exchange's and land interest grants'] impacts on eutrophication, noise, night lighting, visual impacts, desert tortoises, groundwater, air quality, and Bighorn sheep." Plaintiffs further contend that the EIS violates NEPA because it "fails to consider a reasonable range of alternatives" to the land exchange. Defendants contend that the EIS "fully addressed" all areas of environmental concern, and as such meets the requirements of NEPA. Defendants also contend that BLM's definition of the "purpose and need" of the land exchange and its analysis of the alternatives to the project satisfies all of the requirements of NEPA.

2. Specific Environmental Impacts

(i) Eutrophication

Plaintiffs contend that BLM neglected to address significant impacts on the environment due to

eutrophication including an increased presence of scavenger raven and coyote populations, impacts on bird, mice, and other small animal feeding habits due to the nutrients from the landfill and windblown trash, and irreparable impacts on the desert food chain.

Plaintiffs and Defendants disagree about the definition of eutrophication. Plaintiffs assert that eutrophication means "an addition of nutrients," properly applied to aquatic systems, but improperly used by Defendants in a broad sense to refer to the large-scale addition of nutrients in landfill trash to the desert ecosystem. AR 50643-4. Defendants assert that eutrophication is a consequence of atmospheric nitrate deposition from the emission and transport of anthropogenically generated nitrogen compounds. AR 43861. Defendants state that sources include agricultural emission of ammonia/ammonium and organic nitrogen from animal wastes and fertilizer applications, and oxides of nitrogen emitted from fossil fuel combustions. AR 43861.

If either definition is used, the administrative record shows that Defendants failed to take a hard look at the consequences of nitrate deposition, in violation of NEPA. The section in the EIS begins with a discussion of Defendants' definition of eutrophication, followed by a discussion of why it is a concern. The section goes on to note that:

> The small amounts of nitrate produced as a result of fossil fuel use associated with landfill operation would be eclipsed by the amount of nitrate produced in the Los

> Angeles Basin and in urban desert communities closer to the landfill. ... [N]itrates from fossil fuel combustion [generated by visitors to JTNP who arrive by automobile] is expected to be greater than that produced by landfill operations.

AR 43861. General statements that eutrophication brought about by the Project will introduce less nitrate into JTNP than other sources of nitrate and that nitrate levels from fossil fuel combustion are *expected* to be greater than that produced by landfill operations do little to inform the agency and the public of the impact of the *overall* increase in nitrate levels as a result of the Project. The draft EIS also concludes:

> [N]itrate is transported by prevailing winds, which are westerly in the vicinity of the proposed Project. Because the landfill is southeast of JTNP, nitrates generated from landfill operations would be transported away from JTNP rather than toward it. . . . Nitrate deposition associated with landfill operations, therefore, is expected to have no effect on ecosystem function [in] JTNP.

AR 43861. However, this conclusion only examines the impact on JTNP, and not on the overall environment.

The record also indicates that Defendants failed to take a hard look at the issues presented under Plaintiffs' definition of eutrophication. The EIS only

cursorily mentions that changes in predator/prey relationships could adversely affect prey species from increased food availability from the landfill, without any discussion of the extent of the potential impact. AR 43860. While Response to Comment 1-153 states that "[p]roject design and mitigation measures that will prevent access to refuse by various animals that might otherwise consume it will make the amounts of nutrient additions to the local ecosystem so small that these amounts are immeasurable and do not constitute a significant adverse impact on ecosystem function." AR 46842. This assertion is not supported by any data. Under NEPA, the agency must consider cumulative impacts using some quantified or detailed information, such that the courts and the public can be assured that the agency took the "hard look" that is required of it. *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372,1380 (9th Cir. 1998). Defendants have failed to demonstrate that they used adequate quantified or detailed information sufficient to satisfy NEPA's requirements regarding the effects of the Project on the eutrophication aspect of the environment.

(ii) Noise, Night Lighting, and Visual Impacts

Plaintiffs further urge that Defendants failed to take a hard look at the environmental impacts related to noise, night lighting, and visual experience. However, a review of the record confirms that Defendants did indeed take a hard look at all three, and thus complied with NEPA in these respects.

In contrast to the section of the EIS on eutrophication, the sections on noise, night lighting, and visual impacts are all lengthy, comprehensive, and evidence a good faith effort by Defendants to address legitimate environmental concerns. For example, assessing visual impacts "involved development of computer simulations showing before-and-afiter views from eight 'key observation points'." To assess the impact of night lighting, the BLM commissioned a study which concluded that such "nightglow" would only be perceptible "in the immediate vicinity of the Project site." AR 46685.

The section on noise is replete with evidence of scientific measurements and analysis:

> The train-related noise level at the JTNP wilderness boundary is calculated to be 30 dBA CNEL. The existing noise at the wilderness boundary was measured to be approximately 39 dBA CNEL.

AR 43974. With respect to the potential noise generated by trucks, the section states:

> Project-related traffic noise is expected to increase the noise levels at the JTNP eastern boundary, which is the boundary nearest the Eagle Mountain Road, by approximately 5 dBA. Noise levels at the wilderness boundary are expected to increase by 1 dBA, which is a level of increase generally indiscernible to the human ear.

AR 43981.

Such discussion, containing measurements generated by studies commissioned to study these particular concerns, as well as extensive mitigation measures, lead the court to conclude that Defendants did take the required hard look. While Plaintiffs may disagree with Defendants conclusions, such disagreement is of no moment. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 553,98 S.Ct. 1197,1216 (1978) (NEPA does not allow a court to overturn an agency action because it disagrees with the agency's decision or with its conclusions about the scope, breadth, or effect of the environmental impacts of the project at issue.)

(iii) Desert Tortoises

Plaintiffs contend that the EIS improperly ignored adverse impacts from the landfill on the desert tortoise. The court finds that Defendants have satisfied the hard look requirement of NEPA with respect to the Project's potential impact on the desert tortoise.

Ninth Circuit precedent is clear: NEPA requires disclosure of a project's impacts on wildlife habitat. *See Marble Mountain Audubon Soc'y v. Rice*, 914 F.2d 179,182 (9th Cir. 1990); *see also Utahns for Better Transportation v. United States Dep't of Transp.*, 305 F.3d 1152,1180 (10th Cir. 2002). In their EIS, Defendants disclosed that desert turtle habitat loss would occur from access road improvements and from loss of approximately 1,038 acres of currently

undisturbed habitat at the landfill site. AR 43860. The EIS further states that the habitat could be fragmented by the reactivation of Eagle Mountain Railroad, and the potential changes in the predator/prey relationships which could adversely affect the desert tortoise, resulting from increased food availability associated with the landfill. AR 43860. As such, Defendants adequately disclosed in the EIS the project's impacts on the habitat of the desert tortoise, in compliance with NEPA.

Defendants also thoroughly addressed in the EIS mitigation measures with regard to the impacts on the desert tortoise. According to Defendants, "BLM and Riverside County retained an independent consulting firm to undertake an unprecedented study; a survey of the mitigation measures contained in every biological opinion issued by the FWS for projects in California and Nevada where the desert tortoise could have been affected." Defendants' mitigation measures include defining work zones to minimize impacts to tortoises, on-site monitors to move tortoises out of harm's way, tortoise fences, tortoise culverts for highway crossings, installation of ballasts to reduce fragmentation, removal of road-kills to avoid feeding of tortoise predators, and chemical deterrence of ravens. AR 45630-1.

(iv) Groundwater Quality

Plaintiffs contend that BLM's treatment of groundwater issues in the EIS are inadequate in terms of both quality and quantity, and that the planned groundwater monitoring program is inadequately described.

NEPA requires disclosure of a project's impacts on water quality. *See Sierra Club v. U.S. Forest Service*, 843 F.2d 1190,1195 (9th Cir. 1988). The court concludes that Defendants took a hard look at the Project's environmental impacts on groundwater including depletion and overdraft. Defendants addressed the potential impact of leachate and landfill gas to contaminate the groundwater. Defendants commissioned a detailed report by Dr. R.K. Ham on the likelihood of these problems over the life of the landfill at Eagle Mountain. AR 44487. Defendants also noted that long term performance of composite liners in the presence of municipal solid waste has been documented by a number of researchers and is "expected to exceed the time period in which leachate and gas would be produced in a landfill." AR 43674. Proposed mitigation measures include a vadose zone monitoring system to detect releases before they reach groundwater and a backup groundwater monitoring system. AR 43674-5. Further, the final cover for the landfill provides additional groundwater protection. AR 43676.

The EIS also evaluated the maximum annual groundwater use by the landfill and the townsite, compared to the annual groundwater recharge and concluded that the landfill would not result in overdrafting the groundwater. Defendants simulated water level declines in general areas in the western Chuckwalla Basin where wells are located. AR 43690. The maximum groundwater-level decline after pumping continuously at the maximum demand rate for 100 years was approximately 15 feet in the nearest existing non-Project well and even less

further away from the Project wells. AR 43690. Forty feet must remain in a well for it to be functional. AR 43690. The nearest existing non-Project well is at least 100 feet deep. AR 43690.

(v) Air Quality

Plaintiffs contention that the EIS failed to take a hard look at the project's potential impact on air quality in JTNP is entirely without merit. The issue of air quality is discussed at length in the final EIS. *See* AR 46266-70. Further, an over 300 page appendix dealing exclusively with air quality discusses such topics as "regional haze," "acid deposition," and "visibility" in JTNP. While it is true, as Plaintiffs contend, that "NEPA imposes an affirmative duty on federal agencies to 'ensure the professional integrity, including scientific integrity, of the discussions and analyses in the [EIS]'," *Utahns for Better Transp. v. United States Dep't of Transp.*, 305 F.3d 1152,1181-82 (10th Cir. 2002) (citing 40 C.F.R. § 1502.24), Plaintiffs do not present to this court any reason to cause it to believe that Defendants have failed to do so.

(vi) Bighorn Sheep

Lastly, Plaintiffs contend that Defendants failed to take a hard look at the proposed project's impact on Bighorn sheep. The court agrees.

In the EIS, Defendants discuss the creation of a "buffer zone" mitigation measure. However, the EIS does not specify exactly what such "buffer zone" entails, or even where it is to be located. As such, it is

far too theoretical to constitute a good faith attempt at mitigation. Further, as stated earlier, the Ninth Circuit has held that an EIS must address a project's impacts on wildlife habitat and migration corridors. *See Marble Mountain Audubon Soc'y*, 914 F.2d at 182. Because the use of tortoise-proof fencing may disrupt the sheep's migration patterns, AR 71:51285, Defendants are obligated under NEPA to address such disruption in the EIS, which they did not do. The Court concludes that the BLM has not engaged in a reasonably thorough discussion of the significant aspects of probable environmental consequences of the land exchange and land interest grants as to eutrophication and the Big Horn Sheep.

2. Statement of "Purpose and Need"

Plaintiffs contend that Defendants statement of "purpose and need," for the proposed land exchange and land interest grants as required under 40 C.F.R. § 1502.13, is "unreasonably narrow." Defendants contend that they properly defined the purpose and need of its actions to include the goals of the Project proponent.

The Ninth Circuit affords agencies considerable discretion to define the purpose and need of a project. *Friends of Southeast's Future v. Morrison*. 153 F.3d 1059 (9th Cir. 1998) (citing *City of Angoon v. Hodel*. 803 F.2d 1016 (9th Cir. 1986)). However, agencies do not have unlimited discretion to define the purposes of a project. *Friends of Southeast's Future* at 1066. "An agency cannot define its objectives in unreasonably narrow terms." *City of Carmel-by-the-Sea v. United States Department of Transportation*,

123 F.3d 1142 (9th Cir. 1997). "[A]n agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." *Friends of Southeast's Future*, 153 F.3d at 1066 (quoting *Citizens Against Burlington, Inc. v. Busey*. 938 F.2d 190 (D.C. Cir. 1991)).

> The stated purposes of the Project at issue in this case are:
>
> [t]o develop a new Class III nonhazardous municipal solid waste landfill to meet the projected long-term demand for environmentally sound landfill capacity in Southern California; provide a long-term income source from the development of a nonhazardous municipal solid waste landfill; find an economically viable use for the existing mining by-products at the Kaiser Eagle Mountain Mine site, including use of existing aggregate and overburden; and provide long-term land use and development goals and guidance for the Townsite.

AR 43293.

The court concludes that the BLM abused its discretion by so narrowly defining the purpose and need of the proposed land exchange that *only* the proposed land exchange and land interest grants

could accomplish the agency's goals. The EIS examines six alternatives to the proposed action: 1) No Action; 2) Reduced Volume of Onsite Disposal; 3) Alternate Road Access; 4) Rail Access Only; 5) Landfill on Kaiser Land Only, and 6) Landfill Development/No Townsite Development.

The "No Action" and "Landfill Development/No Townsite Development" alternatives are clearly inconsistent with the stated Project purposes of developing landfill capacity and providing "long-term land use and development goals and guidance for the Townsite." Further, the alternatives of "Reduced Volume of Onsite Disposal," "Alternate Road Access," and "Rail Access Only" all presuppose the existence of a landfill on the site of the proposed land exchange, and are thus not properly characterized as real alternatives to the land exchange and land interest grants.

Defendants' statement of purpose and need is a self-fulfilling prophecy. *See Friends of Southeast's Future*, 153 F.3d at 1066; *Citizens Against Burlington, Inc.*, 93 F.2d at 196, *supra*; *City of New York v. United States Department of Transportation*, 715 F.2d 732, 743 (2d Cir. 1983) ("[A]n agency will not be permitted to narrow the objective of its action artificially and thereby circumvent the requirement that relevant alternatives be considered.") It contrasts markedly with the statement of purpose and need at issue in *Friends of Southeast's Future*, which the Ninth Circuit found to be "not unreasonable." *Id.* at 1067.

In *Friends*, the Forest Service was considering several alternatives for harvesting timber within a specified area. The statement of purpose and need provided: 1) to implement certain broadly defined "wilderness," "timber," "visual," "fish," and "wildlife" goals; 2) "to help meet market demand for timber in Southeast Alaska"; and 3) "to move toward the desired future condition for the Project Area by harvesting mature stands of suitable timber and replacing them with faster growing, managed stands of second growth timber, capable of long-term timber production...." The Ninth Circuit held that such a statement "permitted the Forest Service to evaluate a *wide range* of action alternatives... (emphasis added)." In contrast, the statement of purpose and need in the instant case *does not* permit the BLM to evaluate a wide range of alternatives. The only action which will satisfy the statement of purpose and need, other than the "Landfill on Kaiser Land Only" option, is the proposed land exchange and land interest grants. Any other action will leave at least one, if not more, objectives unmet. As such, the EIS is a "foreordained formality," and violates NEPA.

The Court concludes that as to eutrophication, Big Horn sheep, purpose and need and reasonable range of alternatives the BLM has not engaged in a reasonably thorough discussion of the environmental consequences of the subject land exchange and land interest grants. The Court, therefore, will grant Plaintiffs' Motions for summary judgment and deny Defendants' Motions for summary judgment on the NEPA claim as to those subjects for environmental impact analysis. As to the other challenged subjects for an environmental impact analysis the Court finds

that Defendants did engage in a reasonably thorough discussion of the environmental consequences of the subject land exchange and land interest grants. The Court will grant Defendants' Motions for summary judgment and deny Plaintiffs' Motions for summary judgment on the NEPA claim as to those subjects for environmental impact analysis.

3. "Reasonable Range" of Alternatives

Plaintiffs contend that Defendants failed to consider certain reasonable alternatives to the proposed land exchange and land interest grants in violation of 40 C.F.R. § 1502.14. Defendants contend that they considered a "wide range of alternatives designed to accomplish the various major purposes of the landfill project."

Under NEPA, the BLM must consider in its EIS "a reasonably full range of alternatives" to the proposed land exchange. 40 C.F.R. § 1502.14. Such alternatives "are the heart of the [EIS]." *Id.*

Because Defendants defined the purpose and need of the proposed land exchange too narrowly, they did not consider a reasonable range of alternatives. The court will therefore remand these actions to the BLM with direction to consider among other things reasonable alternatives to the proposed land exchange and land interest grants which are more environmentally benign and will effectuate the primary purpose and need of generating long-term landfill capacity for Southern California.

IV.

DISPOSITION

ACCORDINGLY, IT IS ORDERED THAT:

(1) Plaintiffs motions for summary judgment in case no. EDCV 99-0454 and EDCV 00-0041 are GRANTED with respect to the FLPMA claim, and the following NEPA issues: 1) eutrophication; 2) Bighorn sheep; 3) statement of "purpose and need"; and 4) analysis of "reasonable range of alternatives." They are DENIED with respect to the following NEPA issues: 1) noise; 2) night lighting; 3) visual impacts; 4) desert tortoises; 5) air quality; and 6) groundwater;

(2) Defendants motions for summary judgment in case no. EDCV 99-0454 and case no. EDCV 00-0041 are GRANTED with respect to the following NEPA issues: 1) noise; 2) night lighting; 3) visual impacts; 4) desert tortoises; 5) air quality; and 6) groundwater. They are DENIED with respect to the FLPMA claim, as well as to the following NEPA issues: 1) eutrophication; 2) Bighorn sheep; 3) statement of "purpose and need"; and 4) analysis of "reasonable range of alternatives;"

(3) The subject land exchange and grant of rights of way and reversionary interests are set aside and Defendants are enjoined from engaging in any action that would change the character and use of the exchanged properties pending the BLM's preparation of an ROD consistent with the Court's rulings in this Order and an EIS which addresses the deficiencies in

the subject Final EIS as noted by the Court in this Order;

(4) These actions are REMANDED to the BLM for proceedings consistent with this order; and

(5) The Court retains jurisdiction to resolve any legal challenges by Plaintiffs to the new ROD and EIS and to vacate or reaffirm the above stated injunction and set aside Order.

DATED: September 20,2005

//s//
ROBERT J. TIMLIN
United States District Judge

APPENDIX C

IBLA Decision

United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals

DONNA AND LARRY CHARPIED

NATIONAL PARKS AND CONSERVATION ASSOCIATION

IBLA 99-141, 99-150

Decided September 30, 1999

INDEX CODE:

40 CFR 1508.8(b)

40 CFR 1508.27(b)

43 CFR 4.450.2

43 CFR 1601.0-5(b), (c)

43 CFR 1610.5-3(a)

43 CFR 2200.0-6

43 CFR 2201.3(a)

43 CFR 2201.5(c) (2)

43 CFR 2804.1(b)

50 CFR 17.11(h)

Appeals from decisions of the California State Director, Bureau of Land Management, granting two rights-of-way (CACA-25594 and CACA-31926) and denying protests against a proposed land exchange (CACA-30070).

Affirmed.

1. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements

Under section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1994), the adequacy of an EIS must be judged by whether it constituted a "detailed statement" that took a "hard look" at the potential significant environmental consequences of the proposed action, and reasonable alternatives thereto, considering all relevant matters of environmental concern. In general, an EIS must fulfill the primary mission of that section, which is to ensure that BLM, in exercising the substantive discretion afforded it to approve or disapprove an action, is fully informed regarding the environmental consequences of such action. In deciding whether an EIS promotes informed decisionmaking, it is well settled that a "rule of reason" will be employed. An EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decisionmaker to consider fully the environmental factors involved and to make a

reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives. The question is whether the EIS contains a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the proposed action and alternatives thereto. Where BLM has complied with the procedural requirements of section 102(2)(C) of NEPA by taking a hard look at all of the likely significant environmental impacts of a proposed action, it will be deemed to have complied with the statute, regardless of whether a different substantive decision would have been reached by this Board or other decisionmaker.

2. Exchanges of Land: Generally--Federal Land Policy and Management Act of 1976: Exchanges

BLM may dispose of lands by exchange under section 206(a) of FLPMA, 43 U.S.C. § 1716(a) (1994), where it determines that the public interest will be well served by making that exchange. In deciding what is in the public interest, BLM is required to fully consider the opportunity to achieve better management of Federal lands, to meet the needs of State and local residents and their economies, and to secure important objectives, including protection of fish and wildlife habitats, consolidation of lands and/or interests in lands for more logical and efficient management and development; expansion of communities; promotion of multiple-use values; and fulfillment of public needs. In making this determination, BLM must find that the intended use of the conveyed Federal lands will not, in the

determination of the authorized officer, significantly conflict with established management objectives on adjacent Federal lands. BLM has discretion to decide how to balance all of the statutory factors when making a public interest determination. A decision approving a land exchange will be affirmed where the record shows that BLM met these requirements.

3. Exchanges of Land: Generally--Federal Land Policy and Management Act of 1976: Exchanges

Section 206(b) of FLPMA, 43 U.S.C. § 1716(b) (1994), requires that the values of the public and private lands exchanged be equal or equalized by the payment (absent waiver in appropriate circumstances) of not more than 25 percent of the total value of the land transferred out of Federal ownership. A party challenging an appraisal determining fair market value is generally required to either show error in the methodology used in determining fair market value or, alternatively, submit its own appraisal establishing fair market value, failing in which the BLM appraisal is properly upheld.

4. Federal Land Policy and Management Act of 1976: Rights-of-Way— Rights-of-Way: Generally--Rights-of-Way: Federal Land Policy and Management Act of 1976

Section 501(a)(6) of FLPMA, 43 U.S.C. § 1761(a)(6) (1994), authorizes the Department to grant rights-of-way over, upon, under, or through public lands for roads, trails, or other means of transportation. Approval of rights-of-way is a matter

of discretion. The Board will ordinarily affirm a BLM decision approving or rejecting a right-of-way application where the record demonstrates that the decision is based on a reasoned analysis of the factors involved, made with due regard for the public interest, and no reason is shown to disturb BLM's decision. An appellant, as the party challenging BLM's decision, has the burden of showing adequate reason for appeal and of supporting the allegations with evidence demonstrating error. Conclusory claims of error or differences of opinion, standing alone, do not suffice.

APPEARANCES: Donna and Larry Charpied, Desert Center California, pro sese; Deborah A. Sivas, Esq., and Alicia Thesing, Esq., Stanford, California, for National Parks and Conservation Association; Perry M. Rosen, Esq., Thomas D. Roth, Esq., and William G. Malley, Esq., Washington, D.C., for Respondents Kaiser Eagle Mountain, Inc., and Mine Reclamation Corporation; David Nawi, Esq., John R. Payne, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Donna and Larry Charpied (the Charpieds) and the National Parks and Conservation Association (NPCA) have appealed from two separate December 9, 1998, decisions of the California State Director, Bureau of Land Management (BLM), granting two rights-of-way (CACA-25594 and CACA-31926) and denying their protests against a proposed land exchange (CACA-30070). By order dated March 5,

1999, we consolidated the appeals (the Charpieds' (IBLA 99-144) and NPCA's (IBLA 99-150)), granted expedited consideration, stayed the approval of the land exchange pending our review of the appeals, denied a stay of the granting of the two rights-of-way, and granted the petition of Kaiser Eagle Mountain, Inc. (KEM), and Mine Reclamation Corporation (MRC), to intervene as Respondents.

The procedural history of this matter is long and the case record voluminous. It is sufficient to note that BLM has been processing a land exchange proposal submitted in 1989 by KEM to facilitate construction and operation of the Eagle Mountain Landfill and Recycling Center Project (the Project), an enormous solid waste municipal landfill to be constructed on a privately-owned unreclaimed open pit iron ore minesite located in eastern Riverside County, California, approximately 1 1/2 miles from the Joshua Tree National Park (JTNP), at its nearest point.[1] The Project also includes the planned

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[1] As stated by the California Court of Appeal,

"[t]he Eagle Mountain open pit iron ore mine was the location of extensive mining operations by Kaiser Steel Corporation [KSC] from 1948 to 1983. The mine is located approximately 200 miles east of Los Angeles, 50 miles west of the Arizona border, 10 miles north of Desert Center, and approximately one and one half miles south of [JTNP]. The mining operation resulted in the excavation of three large open pits; each[ ] one to two miles long. The mining operations ceased in 1983, and Kaiser has leased the mine site to [MRC], the prospective operator of the landfill.

"[MRC] plans to utilize the open pits left from the mining operation to create what all parties have agreed is the largest

landfill in the country. The landfill footprint will encompass approximately 2,262 acres with a larger project area of 4,654 acres. The landfill will have the capacity to accept up to 20,000 tons per day of wastes for a minimum of 115 years." *National Parks & Conservation Assn. v. County of Riverside*, 42 Cal.App.4th 1505, 1509-10 (1996) (NPCA I) (quoting Trial Court).

In its more recent decision, the Court of Appeal added:

"The landfill will fill in areas left by the huge pits of the mining operations (farthest from the Park, to begin with) and will also fill in nearby canyons and hillsides which already contain the waste material from mining operations. A six-inch layer of dirt and mine debris will be placed daily upon the fill material. In addition to the landfill, the project will include the operation of a 52-mile railroad line and the upgrading of a county road, both for purposes of bringing in the trash for processing. Also, an existing campsite in the area, an outgrowth of a previous company town run by the mining company, will be expanded to serve the workers at the landfill. Currently, the campsite has a few hundred residents and a privately run prison facility operates there, housing 500 prisoners.

"The site of the landfill project is about one and one-half miles from the nearest Park boundary, as established in 1994 when the Park was converted from a national monument to a larger national park through the federal California Desert Protection Act, which expanded the Park boundaries. (16 U.S.C. § 410aaa-21 *et seq.*) The areas between the site and this portion of the Park boundary include infrastructure such as an aqueduct, a pump station, utility and communication lines, roads, and another employee townsite." *National Parks & Conservation Assn. v. County of Riverside*, No. D031056 (Slip Opinion at 5-6, May 7, 1999) (NPCA II).

KSC operated an open pit iron ore mine at this site (on patented mining claims) from 1947 to 1982, when large-scale mining operations ceased. Shipping of iron ore and other activity continued for some time thereafter, but KSC declared bankruptcy in 1987, emerging from bankruptcy in 1988 as Kaiser Steel Resources (KSR). Recognizing the site's potential

renovation and repopulation of the adjacent area known commonly as the Kaiser "campsite" to provide housing for Project workers.

The present appeals arise because, on September 25, 1997, BLM's California Desert District Office (CDDO) Manager issued a Record of Decision (ROD) announcing that he "approved the land exchange" (CACA-30070) between KEM and the United States (ROD at 1), and that a final decision to issue two rights-of-way to KEM would be withheld "pending receipt and review of any protest to the land exchange."[2] BLM received protests against that ROD, including those by the Charpieds and NPCA. On December 9, 1998, the California State Director, BLM, issued decisions denying those protests. The State Director also announced that BLM would issue

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as a landfill, KSR leased the Eagle Mountain site to MRC to develop the Project. (KEM/MRC Answer at 6-7.) MRC and KEM jointly pursued applications for the project.

Our review of the record shows that the landfill is described as a "Class III, non-hazardous, solid waste landfill" comprising about 2,164 acres. In addition to the landfill, the project area would consist of about 2,490 acres for buffer and ancillary features. (Draft Environmental Impact Statement/Environmental Impact Report (EIS/EIR) at ES-2.)

[2] BLM's announcement in the ROD that it had "approved the land exchange," viewed by itself, suggested that BLM was issuing an immediately appealable decision to approve the exchange. However, from BLM's statement that it expected to receive and adjudicate protests against the action, it is apparent that BLM was announcing that it was merely proposing to approve the exchange at that time. No protest would have been available unless the action was "proposed to be taken." *See* 43 C.F.R. § 4.450-2.

the two rights-of-way pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. § 1761 (1994), and 43 C.F.R. § 2804.1(b). The Charpieds and NPCA have appealed from the denial of their protests and also challenge the decision to grant the rights-of-way.

The State Director's decision cleared the way for the exchange of approximately 3,481 acres of public land and the reversionary interest held by the United States in the surface estate of approximately 460 acres of private land (selected public lands),[3] to KEM in return for 10 parcels owned by KEM totaling approximately 2,846 acres (offered private lands) plus a cash payment of $20,100, representing the cash value difference in valuations. (ROD at 2, 19.) [4]

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[3] *See* ROD Ex. A-1.

In 1955, the United States issued Patent Los Angeles 0121702 conveying the surface estate in 465.85 acres to KSC for campsite and millsite purposes, pursuant to section 3 of the Act of July 8, 1952, Priv.L. No. 790, 66 Stat. A130. The patent provided that title to the surface estate would revert to the United States if it was not used "for a continuous period of seven years as a camp site or mill site or for other incidental purposes in connection with the mining operations of [KSC] or its successors in interest." This Federal "reversionary interest" was expressly included in the selected public lands. (ROD at Ex. A-1 p. 3.)

[4] *See* ROD at 9-10; Ex. A-2. The reference elsewhere in the ROD to seven parcels owned by Kaiser (ROD at 19) relates to the Appraisal Report, which grouped the 10 parcels of offered private lands into 7 groups by combining some parcels of contiguous lands for appraisal purposes. (Appraisal Report, Vol. III at 2, 43-70.)

The parcels of selected public lands are scattered around the fringes of the private land where the iron ore mine is situated. (Appraisal Report Vol. II at 33; ROD Ex. B; Draft EIS/EIR Technical Appendices[5] Vol. II, p. A-3.) Review of the plans submitted by KEM shows that use of these lands is integral to the planned operation of the Project. None of the selected public lands is contiguous to lands within JTNP. *See* ROD Ex. B.

The 10 parcels of offered private lands are scattered along the route of an existing rail line running to the landfill site from the Southern Pacific Railroad at Ferrum Junction, near the Salton Sea. *Id.* Their acquisition would generally consolidate public landholdings administered by BLM. Three of the parcels of offered private lands ("Group C") are situated within the Chuckwalla Bench Area of Critical Environmental Concern (ACEC) (ROD at 10);[6] three ("Group A") are situated in the vicinity of

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[5] The EIS/EIR that was approved in January 1997 adopted most of the discussion of environmental consequences set out in the July 1996 Draft EIS/EIR, making only what are described as "minor changes in the description of the environmental consequences, resulting from public and agency comments." (Final EIS/EIR at 4-1.) As a result, much of the substance of the EIS/EIR appears in the Draft EIS/EIR.

[6] The Chuckwalla Bench ACEC is situated 13 miles south of the Project site and provides habitat for the desert tortoise (*Gopherus agassizii*), a Federally-listed threatened species under the Endangered Species Act of 1973 (ESA), *as amended*, 16 U.S.C. § § 1531 through 1544 (1994). See 50 C.F.R. § 17.11(h).

the Salt Creek (Dos Palmas) ACEC (ROD at 9);[7]

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[7] The Salt Creek (Dos Palmas) ACEC is situated 30 miles southwest of the Project and encompasses a tributary of the Salt Creek, which provides habitat for the desert pupfish (*Cyprinodon macularius*), a Federally-listed endangered species.

BLM noted in the ROD that the "entire ACEC area of about 14,000 acres includes both Federal and private lands and is popularly referred to as Salt Creek (Dos Palmas) ACEC, even though the ACEC only includes the Federal lands." (ROD at 9.) The ACEC is referred to as the "Dos Palmas/Salt Creek ACEC" elsewhere in the ROD. (ROD at Ex. B.)

The Charpieds make much of inconsistencies in the nomenclature for the Salt Creek (Dos Palmas ACEC), asserting that "this ACEC is known as the Salt Creek Pupfish/Rail ACEC, and is only popularly known as Dos Palmas in the deep recesses of [BLM's] mind, ever since the first [notice of realty action (NORA)] was issued in 1992." The Charpieds fail to show how the difference in nomenclature has any significance.

The Charpieds assert that BLM has somehow changed the ACEC boundaries without notifying the public and that BLM claims "this ACEC to be more than legally designated *** because they cannot justify acquiring all of those Kaiser railroad lands which are not in or abutting that critical habitat known as Salt Creek." (Charpieds' Statement of Reasons (SOR) at 18. This misconception apparently arises from the fact that BLM referred to "the entire ACEC area" as having 14,000 acres instead of 4,253 acres as calculated by the Charpieds. That discrepancy is fully explained by BLM. (BLM Answer at 12-13.) The boundary of the ACEC encloses approximately 14,000 acres, referred to by BLM imprecisely as the "entire ACEC area," which included *both* Federal lands *and* non-Federal lands. However, the ACEC actually consists only of Federal lands managed by BLM within the boundaries of the ACEC, which total much less.

To the extent that the Charpieds argue that BLM surreptitiously enlarged the ACEC to justify the land exchange, they are simply mistaken. The boundary of the ACEC (originally denominated "ACEC 60") does not appear to have

three ("Group B") are situated near the southern boundary of the Orocopia Mountains Wilderness Area; and one ("Group D") is situated in an area designated by the U.S. Fish and Wildlife Service (FWS) as critical habitat for the desert tortoise that is "adjacent to a large block of BLM managed lands to the north," although it "is not inside any specially designated management area." (ROD at 10.) The offered private lands conveyed to BLM by KEM will become part of the California Desert Conservation Area (CDCA) pursuant to 43 C.F.R. § 2200.0-6(f). (ROD at 2.) The offered private lands are and will continue to be crossed by a rail line connecting the Project with the Los Angeles metropolitan area.

Right-of-way grant CACA-25594 (the "rail line right-of-way"), issued to KEM, authorizes use of a 28.6-mile corridor through scattered Federal lands along the existing 52-mile Eagle Mountain rail line between Eagle Mountain and Ferrum Junction. The rail line right-of-way would also allow the construction of a new rail spur from the terminus of the existing rail line to the landfill site. (Draft EIS/EIR at 1-18, Fig. 2-12.) It also authorizes a 3-mile extension of the Eagle Mountain Road from the Metropolitan Water District of Southern California's (MWD's) pumping station to the landfill site. (ROD at

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changed since 1984. (*See* BLM Answer, Ex. G-6.) Determining the acreage of the ACEC itself is apparently simply a matter of identifying Federal lands within the ACEC boundary.

BLM's statement that three of the parcels of offered private lands "are located in the vicinity of the Salt Creek (Dos Palmas)" ACEC is entirely accurate.

3.) The rail line right-of-way crosses each parcel group of offered private lands. (ROD at Ex. B.) Right-of-way grant CACA-31936 (the "roadway right-of-way"), issued jointly to KEM and MWD, authorizes the use of 6.75 miles of existing roadway (the Eagle Mountain Road) from north of Interstate 10 to the site. (Draft EIS/EIR Fig. 2-4.) Both rights-of-way are intended to allow haulage of waste materials across public land to the Project.[8]

It is conceded by all parties that, without approval of the exchange and right-of-way grants, the Project will not go forward. BLM served as the "lead agency" in preparation of an EIS, as required by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (1994), as a prerequisite to undertaking any "major Federal action having a significant impact on the quality of the human environment."[9] *See, e.g., Foundation for North American Wild Sheep v. United States Department of Agriculture*, 681 F.2d 1172, 1178 (9th Cir.1982). The County of Riverside (the County) served as the lead State agency to comply with the California Environmental Quality Act (CEQA), California Federal Resources Code § 21000. Together, starting

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[8] The rail line right-of-way replaces an existing right-of-way (LA-0121701) granted to KSC pursuant to Priv.L. No. 790, *supra*. The roadway right-of-way replaces an existing R.S. 2477 right-of-way.

[9] The National Park Service (NPS) and the Biological Resources Division of the U.S. Geological Survey (formerly the National Biological Service), both agencies of the Department of the Interior, served as "cooperating agencies" under NEPA.

in 1995, these agencies prepared the current joint Federal EIS/California State EIR (EIS/EIR), publishing a draft EIS/EIR in July 1996.[10] Following receipt and consideration of extensive public comment, BLM and the County published the final EIS/EIR in January 1997. This EIS/EIR properly considered the environmental effects of the entire project and alternatives, not just impacts on the affected Federal lands. *See* 40 C.F.R. § 1508.8(b) (requiring consideration of "indirect effects") and 40 C.F.R. § 1508.27(b)(7) (requiring consideration of "cumulative impacts").[11] In appealing the State Director's decisions, the Charpieds and NPCA have challenged the adequacy of the EIS/EIR as a basis for his action.

It is well established that, under section 102(2)(C) of NEPA, the adequacy of an EIS must be judged by whether it constituted a "detailed statement" that took a "hard look" at the potential significant environmental consequences of the proposed action, and reasonable alternatives thereto,

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[10] This was the second EIS/EIR that was prepared for this project. The first was completed in July 1992, but was recalled by BLM for further consideration of relevant environmental issues, including impacts (air quality, wildlife, and other resources) of the Project on JTNP and on the desert tortoise. BLM explains that it prepared the new document to comply with a State Court order. (Draft EIS/EIR at ES-5.)

[11] BLM reviewed not only the BLM/Kaiser land exchange and FLPMA right-of-way authorizations, but also the utilization and eventual reclamation of the iron ore mine for use as a municipal solid waste landfill and the renovation of the adjacent Eagle Mountain Campsite.

considering all relevant matters of environmental concern. 42 U.S.C. § 4332(2)(C) (1994); *Colorado Environmental Coalition*, 142 IBLA 49, 52 (1997), and cases cited. In general, an EIS must fulfill the primary mission of section 102(2)(C) of NEPA, which is to ensure that BLM, in exercising the substantive discretion afforded it to approve or disapprove an action, is fully informed regarding the environmental consequences of such action. See 40 C.F.R. § § 1500.1(b) and (c); *Natural Resources Defense Council, Inc. v. Hodel*, 819 F.2d 927, 929 (9th Cir.1987). In deciding whether an EIS promotes informed decisionmaking, it is well settled that a "rule of reason" will be employed. As the Court stated in *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1375 (2d Cir.1977), cert. denied, 434 U.S. 1064 (1978),

> an EIS need not be exhaustive to the point of discussing all possible details bearing on the proposed action but will be upheld as adequate if it has been compiled in good faith and sets forth sufficient information to enable the decisionmaker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives.

The question is whether the EIS contains a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the proposed action and alternatives thereto. *State*

of California v. Block, 690 F.2d 753, 761 (9th Cir.1982) (quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir.1974)).

Where BLM has complied with the procedural requirements of section 102(2)(C) of NEPA by taking a hard look at all of the likely significant environmental impacts of a proposed action, it will be deemed to have complied with the statute, regardless of whether a different substantive decision would have been reached by this Board or other decisionmaker. *See Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980), and cases cited. As we said in *Oregon Natural Resources Council*, 116 IBLA 355, 361 n. 6 (1990):

[Section 102(2)(C) of NEPA] does not direct that BLM take any particular action in a given set of circumstances and, specifically, does not prohibit action where environmental degradation will inevitably result. Rather, it merely mandates that whatever action BLM decides upon be initiated only after a full consideration of the environmental impact of such action.

In order to overcome BLM's decision to proceed with this land exchange and issue these rights-of-way, appellants must carry the burden to demonstrate by a preponderance of the evidence, with objective proof, that BLM failed to consider, or to adequately consider, a substantial environmental question of material significance to the proposed action or otherwise failed to abide by section 102(2)(C) of NEPA. *See Colorado Environmental Council*, 142 IBLA at 52.

The Charpieds complain that the EIS/EIR incorrectly determined that the impact of the project on JTNP will be "insignificant." *See* Draft EIS/EIR at 4.5-16. The question of whether individual adverse impacts have been reduced to insignificance is not presented in relation to the adequacy of the EIS/EIR.[12] If BLM has met its obligation to take a "hard look" at the environmental effects of the Project (including, but not limited to, effects on JTNP), it need not show that every impact has been reduced to insignificance.[13] Instead, a Federal agency is required to discuss mitigation "in sufficient detail to ensure that environmental consequences have been fairly evaluated"; it is not under any "substantive requirement that a complete mitigation plan be actually formulated and adopted." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352

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[12] As discussed below, the question of whether there would be significant impacts is relevant to whether "the public interest will be well served by making" the land exchange under 43 U.S.C. § 1716(a) (1994).

[13] The joint EIS/EIR contains findings of significance or insignificance for each particular impact examined because California law requires it in an EIR. Cal. Public Resources Code § 21100; Cal.Code Regs. § 15126. CEQA also mandates that all "significant" impacts be mitigated to insignificance if feasible. *See* Cal.Code Regs. § § 15091, 15092, and 15093.

The County, by approving the project based on the EIS/EIR, implicitly concluded that this was the case. The California Court of Appeal has subsequently ruled that the County's findings were supported by substantial evidence in the EIS/EIR and must accordingly be affirmed. *See NPCA II* at 4-5. The Supreme Court of California denied NPCA's Petition for Review of *NPCA II* on July 21, 1999.

(1989); *see National Wildlife Federation*, 145 IBLA 348, (1998). Therefore, even if we could agree that the finding in the EIS/EIR that the effects on JTNP (or other environmental impacts) could be reduced to insignificance is erroneous, the EIS would not be rendered invalid under applicable precedent.

Nevertheless, we can agree that the EIS/EIR could not be considered adequate under applicable precedent unless it contains a full analysis of the effects of the Project on JTNP, which is plainly a "relevant matter of environmental concern." Applying that precedent, we conclude that there is no doubt that BLM, in concert with NPS (the agency delegated the responsibility of managing JTNP), has taken a hard look at environmental effects on JTNP. Review of the EIS/EIR reveals that BLM carefully considered the effects of the Project on JTNP.[14] Further, the case record discloses that the EIS/EIR was only the end product of an extensive review by BLM and FWS concerning present and long-term effects of the Project on JTNP. Respondents recite the following history:

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[14] For example, section 4.5.3.1 of the Draft EIS/EIR discusses visual, night lighting, and noise impacts on JTNP and describes mitigation measures; section 4.10.2, more fully discusses visual impacts on JTNP; section 4.1.2.1 finds that quality of ground-water in JTNP will not be degraded; section 4.10.3 addresses the effects of windblown debris and dust on JTNP and mitigation measures; section 4.2.3.2 considers the effect of landfill gas condensate on JTNP; section 4.11.3.1 addresses "skyglow" impacts on wilderness portions of JTNP, and section 4.10.4 of the Final EIS/EIR establishes mitigation measures. *See also* Draft EIS/EIR, Table 1-1 (citing 20 sections discussing impacts on JTNP).

When the decision was made [in 1995] to prepare the new EIS/EIR, BLM invited the NPS to participate as a "cooperating agency" in the preparation of the new document--a role that would recognize NPS' special expertise in evaluating impacts on the newly designated JTNP.

At the scoping stage, the NPS submitted a 12-page letter outlining issues that it wanted to see addressed in the EIS/EIR. With the assistance of the consultant preparing the EIS/EIR, BLM reviewed these issues one by one, held a series of meetings with the NPS staff, and incorporated many of the NPS's recommendations into the Draft EIS/EIR. Before the Draft EIS/EIR was issued, BLM provided an "administrative draft" of the document to NPS for review, and the NPS provided more than 150 pages of comments. Again, BLM responded point by point to NPS's comments in a 34-page response. BLM accepted many of the NPS's recommendations and provided detailed explanations for those it declined to accept. When the Draft EIS/EIR itself was issued, the NPS submitted a third round of comments, even more detailed than the last. Again, BLM painstakingly reviewed the NPS's comments and addressed each of them.

As the new EIS/EIR was being prepared, the NPS again raised the issue of the project's potential *unknown and unpredictable*

> impacts, as it had in 1992. To address this concern, MRC revived an idea that the NPS itself had proposed during preparation of the first EIS/EIR--namely, entering into an agreement that would establish a long-term mitigation and monitoring program. Over the next 18 months, MRC and the NPS engaged in extensive discussions to develop a detailed, enforceable agreement. In the end, MRC and NPS entered into a binding agreement that gives NPS precisely what they had requested as early as 1992--a comprehensive, long-term monitoring and mitigation program, which runs for the life of the project and is specifically tailored to detect and address any unforseen impacts on JTNP. While the NPS made it clear that it would prefer to avoid any industrial-type activity at the mine site, the agency agreed that if the landfill project were to go forward, the agreement with MRC provided the appropriate safeguards for addressing NPS's concerns about any gradual, long-term impacts (which cannot be accurately predicted).

(KEM/MRC Answer at 13-15 (references and footnote omitted).) The case record fully supports the accuracy of this statement.

It is also important that NPS agreed with all of the findings in the EIS/EIR concerning the significance of effects. *See* NPS Agreement; Letter

dated July 11, 1997, from John J. Reynolds.[15] It is clear that BLM did not substitute the NPS Agreement for the analysis in the EIS/EIR. Rather, BLM's review of effects on JTNP was extensive and included NPS, the agency responsible for maintaining JTNP. Acquiring NPS' opinions on the subject of mitigating adverse impacts on JTNP was plainly an essential part of BLM's efforts to take the required "hard look."

The Charpieds also complain that it has not been established that impacts on the desert tortoise have been reduced to a level of insignificance. (Charpieds' SOR at 34.) Impacts to the desert tortoise were discussed at sec. 4.7.3.2 of the Draft EIS/EIR where it was noted that tortoises could be killed, their reproduction reduced, and their habitat lost in several ways attributable to operation of the rail line

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[15] In that letter, John J. Reynolds, Regional Director for the Pacific West Regional Office, NPS, stated:

> "There are, and will continue to be unresolved issues concerning this project, if approved. That would be true with the siting of any industrial activity in this or any location. *** Because of these potential unknown and unpredictable impacts, the NPS entered into the Agreement with MRC, to provide [[[JTNP] with the means to identify and resolve such impacts if they occur. In the Agreement both parties acknowledge the accuracy of the [EIS/EIR] analysis regarding known impacts. The Agreement further states that the NPS and Kaiser/MRC agree that 'the mitigation measures proposed, if implemented, reduce the known effects of the Project on the Park (except for the potential effects on the wilderness experience) below the levels of significance as required by CEQA.' "

and the landfill. (Draft EIS/EIR at 4.7-5-8.) The Draft EIS/EIR concluded that

> [d]irect loss of individual adult or juvenile animals in excess of one animal per year, as specified in the Biological Opinion (USFWS, 1992), reduction in reproductive success in desert tortoise populations, loss of habitat for the tortoise in the immediate vicinity of the Project site, and increase in juvenile tortoise mortality from increased predator populations in JTNP could occur as a result of one or more of the potential effects listed above. This loss would be considered a significant adverse impact.

(Draft EIS/EIR at 4.7-8.) The Draft EIS/EIR proceeded to set out in detail mitigation measures for the Project that would avoid or minimize impacts to tortoises during construction and operation of the Project. Thirty-nine specific protective mitigation measures were set forth. (Draft EIS/EIR at 4.7-20-28.) The Draft EIS/EIR contains an extensive analysis of the these measures' efficacy in protecting tortoises in some 263 other projects that had been authorized in desert tortoise habitats by FWS. (Draft EIS/EIR at 4.7-31 to 4.7-36, Appdx. G at 3-32 to 3-39.) Finding that the FWS-mandated mitigation measures had been effective in reducing tortoise mortality to acceptable levels (Draft EIS/EIR, Appdx. G at 3-39,) the Draft EIS/EIR concluded, "Because implementation of the recommended terms and conditions for this and other projects will reduce the potential numbers of tortoises killed to less than that authorized, the potential impacts would be reduced to

below the level of significance." (Draft EIS/EIR at 4.7-36.)

The Final EIS/EIR also imposed additional protective measures by increasing the area of desert tortoise habitat that BLM will receive from KEM from 375 to 400 acres as mitigation for an additional 10 acres of desert tortoise habitat that would be destroyed by the Project. Further, BLM expanded control measures for ravens, which are known to prey on desert tortoises, to cover the Campsite area. (Final EIS/EIR at 6-20.)

Once again, BLM is not required by applicable law to show that impacts on the desert tortoise would be insignificant. Those findings have no bearing on the adequacy of the EIS/EIR under Departmental law. Nevertheless, we must consider whether effects on the desert tortoise were fully addressed in the EIS/EIR, because it could not properly be considered adequate without such analysis. The record amply demonstrates that BLM took the requisite "hard look" at this issue. Section 7 of the ESA, 16 U.S.C. § 1536 (1994), requires that BLM consult with FWS to evaluate the landfill project's potential impacts on threatened and endangered species, including the threatened desert tortoise and endangered desert pupfish. Following initiation of consultation with BLM, FWS issued Biological Opinion 1-6-92-F-39, dated September 10, 1992, addressing the effects of the proposal on the desert tortoise and imposing site-specific protective limitations on MRC's operation of the rail line and landfill, including 28 mitigation measures that would "alleviate impacts to desert tortoise and desert pupfish."

FWS reaffirmed the validity of the 1992 Biological Opinion in September 1993, following a Departmental proposed designation of critical habitat for the desert tortoise, and again in September 1996, following review of the amended Draft EIS/EIR. BLM expressly adopted the mitigation measures specified in the FWS Biological Opinion, among others. (ROD Ex. C, 17-21.)

The Charpieds also challenge the adequacy of the environmental review of effects of the Project on groundwater, noise impacts on JTNP, noise impacts on animals (Charpieds' SOR at 25), impact on JTNP of "skyglow" from the Project (Charpieds' SOR at 24-26) and from repopulating the campsite (Charpieds' SOR at 26), impacts on visual resources (Charpieds' SOR at 27-28), and the impacts of possible "eutrophication." (Charpieds' SOR at 29-30.)[16] As

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[16] Eutrophication" is a process, associated with aging aquatic ecosystems such as lakes, whereby concentrations of phosphorus, nitrogen, and other plant nutrients increase, altering the ecosystem by algae blooms or microscopic organisms. "Cultural eutrophication" occurs when the aging process is sped up by the activities of humankind by allowing excess nutrients in such forms as sewage, detergents, and fertilizers to enter the ecosystem. *Encyclopedia Britannica*, Micropaedia Vol. III at 1007 (1979).

In the present context, NPS used the term "eutrophication" to refer to the addition of nutrients (in garbage and trash) to the desert ecosystem, raising the possibility that the ecosystem would be upset by the proliferation of animal life such as insects and rats. NPS requested that this possibility be examined in the EIS/EIR process. *NPCA II* at 29-30.

before, the issue of what standards were used in the EIS/EIR to determine whether there were "significant" impacts from these effects (Charpieds' SOR at 22, 24-28) is not presented in the context of our review of the adequacy of the EIS/EIR. We must instead review each issue to determine whether the effects cited by the Charpieds are "relevant matters of environmental concern" or constitute "probable environmental consequences," such that BLM was required to present a "reasonably thorough discussion" of them as part of its requisite "hard look." The record shows that the EIS/EIR satisfies BLM's obligation to take a "hard look" at such impacts.

Noise impacts on animals (including impacts on sensitive species including the desert tortoise) were not only analyzed (Draft EIS/EIR at Secs. 4.7 and 4.13), but mitigation measures were developed to reduce the Project's impact on those species. *See, e.g.*, Draft EIS/EIR at 4.7-30. The analysis of noise impacts is not rendered inadequate because it takes notice of the fact that the campsite, which is closer to the landfill project, would be exposed to greater noise impacts than JTNP. (Draft EIS/EIR Fig. 4.13-1 at 4.13-5.) Effects on groundwater quality and use were also extensively considered (Draft EIS/EIR at Sec. 4.1), including a Technical Memorandum on the subject. (Draft EIS/EIR, Appdx. C-1.)

The Charpieds assert that BLM failed to adequately assess "impact of the dump adding a large volume of nutrients into an environment which has been nutrient scarce for thousands of years." (Charpieds' SOR at 29-30.)

We find nothing improper in using "key observation points" (KOP's) to assess impacts on visual resources. The BLM Manual Handbook provides that an individual completes a Visual Resource Management contrast rating "from key observation point(s) using Bureau Form 8400-4--Visual Contrast Rating Worksheet." (BLM Manual Handbook 8431-1, at 2.) The four KOP's within JTNP were selected in consultation with NPS. (Draft EIS/EIR at 4.10-3 to 4.10-4; Letter from Tom Peters, CH2M Hill, to Ernest Quintana, JTNP, dated Aug. 15, 1995.) Four additional KOP's were selected outside JTNP. We do not find BLM's assessment of impacts on visual resources (Draft EIS/EIR at Sec. 4.10.2) inadequate. The EIS/EIR also analyzed the visibility of "plumes" that would be emitted from landfill gas flares, based on the Environmental Protection Agency's (EPA's) technical guidance for evaluating the visibility of plumes. (Final EIS/EIR, Response to Comment 1-87; Draft EIS/EIR Sec. 4.4.1.)

The EIS/EIR addressed "eutrophication" and roadkill. (Draft EIS/EIR at Sec. 4.7.4, ROD at 15; Final EIS/EIR at 7-22 to 7-24; Response to Comments 1-123 and 1-153.) The Charpieds fail to specify how this assessment is deficient and thus fail to meet their burden of showing error in BLM's review. Effects of night lighting were addressed. (Final EIS/EIR Sec. 6.6.)

To the extent that appellants fault BLM for not considering the possibility that mining of the site will resume at some point in the future, compounding

environmental questions, this issue goes beyond presently foreseeable effects. BLM's approval of the Project is subject to ongoing monitoring to determine whether additional adverse impacts to the ecosystem eventuate.

NEPA is primarily a procedural statute designed "to insure a fully informed and well-considered decision." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978). That is, although NEPA requires an agency to prepare an EIS where significant impacts are identified (as BLM did here), nothing in NEPA restrains an agency from proceeding with an action that will have significant impacts where it decides that other values outweigh the environmental costs. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989); *Paul Herman*, 146 IBLA 80, 102 (1998). The purpose of preparing the EIS is to inform the agency of possible adverse environmental effects in hopes that the agency can mitigate them. This expectation was well rewarded in this case. As discussed herein, BLM did not disregard the adverse effects identified in its EIS/EIR, but proceeded to carefully consider them (as well as six other alternatives (ROD at 3)) and develop mitigating measures[17] to reduce or eliminate them, in

[17] MRC is also required to implement a comprehensive, detailed mitigation plan, including the establishment of an Environmental Mitigation Trust, the proceeds of which are to be used to purchase habitat for protection from development. *See* Draft EIS/EIR at 1-5 to 1-6. Further, the Project is replete with monitoring measures to ensure that any unforeseen adverse environmental impacts are timely identified.

consultation with Departmental agencies responsible for the subjects presented. We find no basis to disturb its decision.

Turning to the question of whether the land exchange satisfied the requirements of FLPMA, it is appropriate to set out BLM's findings on this question. The CDDO Manager ruled as follows in the ROD concerning the exchange:

> Based on the environmental analysis of the proposed action and alternatives, I have determined that the land exchange *** as conditioned by the adoption of mitigation and monitoring provision[s] *** will not cause unnecessary or undue degradation to Federal lands and resources and [is] in the public interest. Further, I have determined that the conveyance of the Federal lands will not significantly conflict with established management objectives on adjacent Federal lands.

(ROD at 1.) The District Manager added:

> In accordance with Section 206(a) of FLPMA and [43 C.F.R. § 2200.0-6 of the exchange regulations], I have given full consideration to better Federal land management and the needs of State and local people and their economies. It is my determination that the resource values and Federal objectives on the BLM lands are less than the resource values and Federal objectives gained by acquisition of the non-

> Federal lands and, therefore, this land exchange is in the public interest, and does not significantly conflict with established management objectives on adjacent Federal lands.

(ROD at 3.) The District Manager stated as follows concerning "management considerations," many directly involving the land exchange:

> Based upon a careful examination of the EIS/EIR, Federal comment, and after consultation with the NPS/JTNP, Biological Resources Division, U.S. Geological Survey, the County of Riverside, and other appropriate Federal, State agencies, and local government agencies, I have concluded that the proposed action is consistent with BLM management goals and complies with FLPMA. Development of a landfill at a previously disturbed site and adoption of mitigation measures ensures that all reasonable means to avoid or reduce environmental harm have been incorporated into the Project. It is my determination that the acquisition of non-Federal land exceeds the value of Federal lands and interest to be conveyed. I also find that the use of the conveyed lands subject to mitigation and monitoring described in the EIS/EIR will not significantly conflict with established management objectives on adjacent Federal lands and nearby Federal lands.

(ROD at 8.) The District Manager went on to list and

discuss 18 separate factors that he considered in arriving at that decision. He concluded, *inter alia*, that both the land exchange and rights-of-way conformed with the CDCA Plan of 1980, *as amended* (ROD at 8); that the land exchange presented an opportunity for BLM to achieve better management of Federal lands by allowing it to consolidate Federal ownership of habitat for listed species (*Id.* at 8-10);[18]

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[18] The benefit to protection of threatened and endangered species of plants and animals is one of the most significant public benefits of the exchange. BLM elaborated on these benefits. As to Group A, it stated:

"One of the management objectives in the Salt Creek (Dos Palmas) area is to acquire private lands for the management of various palm oases and seeps that provide habitat for the desert pupfish and Yuma clapper rail, both Federally listed endangered species. Over 3,200 acres have been acquired or are in the process of being acquired by BLM. All three of Kaiser's parcels will contribute to consolidating Federal lands, thus enhancing management of the area. The parcel in Section 23 [, T. 8 S., R. 11 E., S.B.M.,] contains desert pupfish habitat along a tributary to Salt Creek."

(ROD at 9.) As to Group B, it stated:

"These lands are in an area designated by [FWS] as critical habitat for the desert tortoise under the Endangered Species Act. A population of approximately 50 Nelson's bighorn sheep occurs in this area and another population of approximately 100-200 sheep occurs in the Chocolate Mountains to the south. These populations migrate between the mountain ranges in the vicinity of the parcels. Nelson's bighorn sheep is a State of California fully protected species and a BLM sensitive species. Populations of Orocopia Sage, a Federal species of concern, occur on all three parcels. Acquisition of Kaiser's parcels would block up a large area of BLM managed lands and enhance management of lands used by migrating bighorn sheep."

Id. As to Group C, it stated:

that the Project was consistent with State and local programs, plans, and policies, such that "the needs fulfilled and the benefits provided by the landfill as defined by the County and analyzed in the Final EIS/EIR do not conflict with any Federal laws or regulations and that there are no overriding Federal considerations which warrant denial of the land exchange or issuance of right-of-way grants for the landfill" (*Id.* at 10-13); that, "[g]iven the mitigation and monitoring provisions as well as the analysis of impacts, *** all reasonable and practicable means have been taken to avoid or reduce adverse impacts from the Project on JTNP," and that "the subsequent project with mitigation will not significantly conflict with the management objectives in guidances [*sic*] and management plan for the nearby JTNP" (*Id.* at 13-14); that "[i]mplementation of the required

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"One of the management objectives of [the Chuckwalla Bench] ACEC is to acquire all private lands within the boundary of the ACEC primarily for management of desert tortoise habitat. This area supports one of the four major populations of the desert tortoise in California. The parcels contain Category I tortoise habitat with a density of 20-50 individuals per square mile. *** Acquisition of Kaiser's parcels in this area would contribute to consolidating Federal lands, thereby enhancing management of important desert tortoise habitat."

(ROD at 10.) Finally, as to Group D, it stated:

"Tortoise densities are estimated to be 20-50 individuals per square [mile]. Many signs of tortoise were observed on this parcel when transects were run for the biological assessment prepared for the landfill. Acquisition of this parcel would contribute to BLM's management goals of consolidating ownership of Federal lands and habitat for sensitive species." *Id.*

mitigation measures will result in the avoidance or substantial reduction of the environmental impacts to desert tortoise and desert pupfish" (*Id.* at 16); that, "after implementation of the mitigation and monitoring measures, all practical means have been taken to avoid or reduce the potential for impact to groundwater quality," and that "the Project will not result in overdrafting the groundwater" (*Id.* at 16); that, "[a]lthough the nature of the United States' interest [in the 460.63 acres within and around the campsite area] is actually less than a full fee interest, *** for purposes of appraising the value of this interest, the appraiser should value the interest as unimproved patented lands in fee (exclusive of improvements)," and that "[t]his conservative methodology would favor the United States by increasing the compensation that BLM would receive from Kaiser in exchange for these property rights" (*Id.* at 18-19); that title to lands patented under Priv. L. 790 had not reverted to the United States (ROD at 19-20), that the reversionary interest held by the United States in those lands was an "interest" that could be transferred to Kaiser in the exchange (ROD at 20), and that rights-of-way issued under Priv. L. 790 had not terminated; and that the Project involved the "irreversible and irretrievable commitments of resources" in the form of land, but that, in view of the facts that the land had already been subject to "very severe disturbances from over 40 years of mining activities" causing an existing irreversible change in the land and that "development of a landfill at a previously disturbed site, such as Eagle Mountain, avoids significant adverse impacts of locating a landfill in an area not previously disturbed," such "irreversible and irretrievable commitments of

resources" were "not sufficient to warrant disapproval of the land exchange or rights-of-way or the selection of another alternative." (ROD at 22.)

The ROD also contains a finding that "all practicable means to avoid or reduce environmental harm have been adopted." (ROD at 23.) The CDDO Manager also described three "special measures," including (1) an "Environmental Mitigation Trust" funded by a $1-per-ton contribution, the proceeds of which will allow acquisition, restoration, maintenance, and preservation of open space lands, as well as support research and education concerning conservation of natural resources and monitor the long-term effects of the Project on the desert ecosystem; (2) a "Citizens Oversight Committee," to be established by the County to oversee implementation of the landfill and to function as a "watchdog" regarding conditions imposed on the Project; and (3) the NPS/Kaiser/MRC agreement. (ROD at 23-24.)

The State Director, in denying protests against the proposed exchange, held:

> Based on the foregoing and the documentation contained in the case record, I have determined that the [ROD], dated September 25, 1997, issued by the Authorized officer of the [CDDO], is in accordance with the regulations found in Title 43 Code of Federal Regulations 2200. I conclude that the public interest will be well served by completion of this exchange transaction and your protest is hereby dismissed.

(State Director's Decision dated Dec. 9, 1998, dismissing the Charpieds' protest.)[19] The State Director also held as follows, in response to the Charpieds' assertion in their protest that the exchange of lands and right-of-way grants are not in the public's best interest:

> The public interest will be well served by the land exchange. Acquisition of private lands will consolidate Federal ownership in areas designated by [FWS] as critical habitat for the threatened desert tortoise and enhance management of habitat for the endangered desert pupfish. Conveyance of the public lands would serve the needs of State and local people as identified by Riverside County. A determination was made that there is no significant conflict with management objectives on adjacent lands, which are managed by BLM.

(State Director's Decision dated Dec. 9, 1998, dismissing the Charpieds' protest at 4; State Director's Decision dated Dec. 9, 1998, dismissing NPCA's protest at 3.)

Section 206(a) of FLPMA provides:

> A tract of public land or interests therein may be disposed of by exchange by

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[19] Similar language appears in the Dec. 9, 1998, decision dismissing NPCA's protest.

> the [Secretary of the Interior] under this Act *** where the Secretary *** determines that the public interest will be well served by making that exchange: Provided, That when considering public interest the Secretary *** shall give full consideration to better Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife and the Secretary *** finds that the values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the values of the non-Federal lands or interests and the public objectives they could serve if acquired.

43 U.S.C. § 1716(a) (1994).[20] In deciding what is in

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[20] We note that the language of the statute, itself, compels rejection of NPCA's argument (NPCA SOR at 2, Reply Brief at 3) that the standard should be whether the "national" interest justifies proceeding with the exchange. It is clear that, in assessing whether the "public interest" may be "well served" by completing an exchange, the use to which the selected public lands will be put by the private party is an important concern. The present case is a good example, where, as a result of granting the exchange, municipalities will have landfill capacity into the next century. This is in addition to the more direct benefit whereby habitat for protected species will be preserved in public ownership. The fact that private parties will profit from an exchange does not disqualify it. BLM has adopted a general policy of disposing of lands suitable for waste disposal to private concerns in order to avoid exposing the Federal Government to potential liability. *See* ROD at 8. We perceive no

the public interest, BLM, as the authorized officer of the Department, is required to fully consider

> the opportunity to achieve better management of Federal lands, to meet the needs of State and local residents and their economies, and to secure important objectives, including but not limited to: Protection of fish and wildlife habitats, cultural resources, watersheds, wilderness and aesthetic values; enhancement of recreation opportunities and public access; consolidation of lands and/or interests in lands, such as mineral and timber interests, for more logical and efficient management and development; consolidation of split estates; expansion of communities; accommodation of land use authorizations; promotion of multiple-use values; and fulfillment of public needs. In making this determination, the authorized officer must find that *** [t]he intended use of the conveyed Federal lands will not, in the determination of the authorized officer, significantly conflict with established management objectives on adjacent Federal lands and Indian trust lands. Such finding and the supporting rationale shall be made part of the administrative record.

43 C.F.R. § 2200.0-6(b); see *City of Santa Fe*, 103

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grounds to upset that policy, provided that, as here, disposal of such lands complies with relevant authority.

IBLA 397, 399-400 (1988).

While BLM is required to consider this diverse range of factors in determining whether the public interest will be well served by the exchange, it has discretion to decide how to balance all of the statutory factors when making a public interest determination. *See National Coal Ass'n v. Hodel*, 825 F.2d 523, 532 (D.C.Cir.1987); *Lodge Tower Condominium v. Lodge Properties, Inc.*, 880 F.Supp. 1370, 1380 (D.Colo.1995); *National Coal Ass'n v. Hodel*, 675 F.Supp. 1231, 1245 (D.Mont.1987), aff'd, 874 F.2d 661 (9th Cir.1989); *Burton A. McGregor*, 119 IBLA 95, 103 (1991); *John S. Peck*, 114 IBLA 393, 397 (1990). We hold that BLM has properly exercised that discretion herein. Although disposal of the selected public lands favors fulfillment of the public need for waste disposal and expansion of the Project community, BLM made every effort to balance those effects by securing important protective concessions in the manner in which the Project will be operated. Further, the acquisition of the offered private lands will provide important habitat to balance any harm to wildlife interests. The record contains ample justification for its conclusion that the public interest will be well served by making this exchange.

As noted above, contrary to NPCA's assertions (Reply Brief at 3), BLM's decision documents and supporting Draft and Final EIS/EIR contain extensive discussions of the factors set out in 43 C.F.R. § 2200.0-6(b). That record shows that the acquired private lands have substantial value as habitat for threatened and endangered species, so

that acquiring them serves the purpose of protection of fish and wildlife habitats. The position of those lands relative to current Federally-owned habitat means that their acquisition will allow for more logical and efficient management and development. We also recognize that, apart from the direct benefits of acquiring the parcels of offered private lands, approval of the exchange promotes the Project, which undeniably meets the "needs of State and local residents and their economies" by allowing both a 100-year waste disposal facility for a major metropolitan area, as well as economic development of the Project area. BLM may properly consider these factors as part of its obligation to promote multiple-use values, to fulfill public needs, and to expand communities.

Under section 206(a) of FLPMA, the Department must also find "that the values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the values of the non-Federal lands or interests and the public objectives they could serve if acquired." There is no doubt that the Federal lands and interests to be conveyed here (the selected public lands) have been greatly reduced in value due to their proximity to Kaiser's mine and its spoil piles, tailing ponds, etc. (Appraisal Report Vol. I at 9-13.)[21]

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[21] We reject NPCA's assertion that BLM somehow failed to address the "value of the selected public lands to the wildlife, wilderness, scenic, recreational and cultural interests of" visitors to JTNP. (NPCA Reply Brief at 5.) BLM's Appraisal Report thoroughly describes the selected public lands, and it is evident from that description that, due to their proximity to the

Further, these lands are encumbered by mining claims held by KEM, such that they may be mined or even patented. *Id.* at 15. Against this background, it is evident that disposal of these lands in exchange for wildlife habitat plainly entails a net gain for the public.

Significant impacts of the Project on JTNP or the desert tortoise or other significant impacts could tip the balance against a determination that the public interest would be well served by approval of the land exchange. With only three exceptions, the EIS/EIR found that there will be no significant impacts, following mitigation measures.[22] We are satisfied, based on the involvement of NPS and FWS officials throughout BLM's consideration of this matter, that

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abandoned iron ore mine, they have no value as parklands. By determining in the Appraisal Report that their highest and best use was for sale for commercial purposes, BLM tacitly so concluded.

[22] The EIS/EIR acknowledged that the "projected increases in air emissions within the South Coast Air Basin resulting from the long-distance transport of solid waste and the incremental increase of emissions in the Southeast Desert Air Basin cannot be entirely avoided," and that "[i]mpacts to the California leaf-nosed bat and the Townsend's big-eared bat cannot be mitigated to below the level of significance," even with "the implementation of mitigation measures." (Draft EIS/EIR at ES-17.) Further, noting that significance criteria could not be defined to quantify impacts on "intangible components of the wilderness experience (e.g., peace, solitude)," and that CEQA requires a mandatory finding of significance in the absence of significance criteria, the EIS/EIR found accordingly that impacts to the intangible components of the wilderness experience would be significant.

these remaining impacts are not great enough to compel a finding that the public interest will not be well served by approval of the land exchange.

The Charpieds assert that the Project will adversely impact the Chuckwalla Basin aquifer, a fact that, if proven, would call into question BLM's holding that the public interest will be well served by approval of the exchange. BLM fully addressed the question of the effect of the Project on the groundwater. We are satisfied that BLM properly concluded the Project, if constructed as designed, will not result in pollution of the underlying groundwater and that, any failure of the groundwater protection system can be identified in time to prevent catastrophic damage to or destruction of that irreplaceable asset.[23]

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[23] Most of the waste materials received at the site (as much as 16,000 tons per day) would be hauled there in sealed and locked containers by rail, after processing at transfer stations (known as "Materials Recovery Facilities") in surrounding communities. The remainder (4,000 tons) would come by truck. The waste materials would be routinely screened prior to receipt at the site and periodically screened at the site, in order to ensure the removal of all excluded wastes. Also, all recyclable materials not previously removed would be removed and processed at a recycling center, which would also be operated at the landfill site. (Draft EIS/EIR at 1-6.)

The waste materials would be spread in the mine pit and covered with either (1) interim cover, in turn consisting of either a daily cover at least 6 inches thick (placed and compacted over waste at the end of each day's operation) or an intermediate cover at least 1-foot-thick (for areas that will not accept additional waste for at least 180 days) (Draft EIS/EIR at 2-34), or (2) final cover, which will overlie all of the accumulated

waste and would consist of a 2-foot-thick foundation, a 40-mil flexible geomembrane (plastic liner) with a maximum hydraulic conductivity of 1 x 10-9 cm/s, a geotextile cushion layer, a 1-foot-thick soil protection layer, a geotextile filter layer, and a 2-foot-thick erosion layer consisting of cobble- and boulder-sized material with an average particle diameter of about 18 inches. (Draft EIS/EIR at 2-38.)

In order to prevent the migration of leachate (liquid containing contaminants) to groundwater during landfill operations and thereafter, the entire waste disposal area will be lined with a high-density polyethylene geomembrane (plastic) liner, with a thickness of 80 mils, underlain by a low-permeability soil liner with a hydraulic conductivity of not more than 1 x 10-7 cm/sec and a thickness of at least 2 feet, and covered by a geotextile cushion layer. (Draft EIS/EIR at 2-26 to 2-28, Fig. 2-9.)

Further, to avoid any buildup of leachate on top of this composite liner, a leachate collection and removal system (LCRS) would be placed above the liner. Any leachate would be collected in a blanket layer of permeable drainage material (LCRS gravel), beneath a protection soil layer and geotextile filter fabric, removed by drainages to sumps, and pumped for treatment. (Draft EIS/EIR at 2-29 to 2-30, 2-40 to 2-42, Fig. 2-11.)

Landfill gas (primarily methane and carbon dioxide produced by bacterial activity associated with decomposing waste materials) will be removed from the landfill site through a horizontal grid of pipes laid at various levels in the layers of waste mass overlying the composite liner and/or vertical wells drilled down through those layers. Upon removal, the gases would be burned (flared). (Draft EIS/EIR 2-30 to 2-34; 2-41 to 2-42.)

In addition, in the base area, detectors would be placed in a "vadose zone" as required by California law. (Draft EIS/EIR at 4.1-11.) An unsaturated zone liquid monitoring layer (UZLML) will be placed below the composite liner but above another geotextile cushion and geomembrane liner and a 1-foot-thick foundation layer (Draft EIS/EIR Fig. 2-9), for the purpose of

The Charpieds also fail to show error in BLM's finding on the separate question of whether satisfying the Project's demands for water will permanently place the Chuckawalla Basin aquifer in deficit. BLM, relying on its experts, found that the Project, will not use so much water that the water table would be reduced to the point where the Charpieds would lose the use of their irrigation well. The Charpieds present their own expert's opinion stating that BLM has overestimated the availability of water in the aquifer and point out that the level in their water well (which, they assert, BLM has not monitored) is declining, showing that the aquifer is already in deficit. Professional disagreement by an appellant's expert witnesses with the findings and conclusions reached by BLM decision makers is insufficient to overturn a BLM decision. *Riddle Ranches, Inc. v. Bureau of Land Management*, 138 IBLA 82, 102 (1997); *Sierra Club*, 104 IBLA 76, 84 (1988).

The Charpieds (Charpieds' SOR at 4, 17-19) and NPCA (NPCA SOR at 4) both argue that the fact that the rail line right-of-way runs across the offered private lands reduces their value for habitat

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detecting any failure of the landfill containment system. There will also be an unsaturated zone gas monitoring system (UZGMS) below the UZLML. (Draft EIS/EIR at 2-56.) The UZGMS will consist of a series of small-diameter pipes with perforated zones at points under the landfill. These systems would monitor the migration of any landfill gas and leachate so that steps could be taken to remove them.

purposes, thus suggesting that the exchange will not, as BLM held, "secure" the "important objective" of "protection of fish and wildlife habitats" under 43 C.F.R. § 2200.0-6(b). The record demonstrates that BLM and FWS studied the potential impacts of operation of the rail line on wildlife habitat in connection with mitigation measures that would apply to those operations. (ROD at 14-15; FWS Biological Opinion at 16-23.) FWS stated as follows:

> [FWS'] Biological Opinion strikes a balance between minimizing the risk of injury from train traffic and fragmenting tortoise habitat and populations. The approach consists of two years of preconstruction monitoring *** to determine baseline conditions and a minimum three-year survey/monitoring period during project operations ***. Data obtained by these surveys would be provided to [FWS] and BLM so that the agencies could design an appropriate culvert/tortoise fence system to (1) protect tortoise from risk of train traffic, and (2) facilitate tortoise movement across (under) the railroad tracks. The survey data would be used to customize a culvert/fence design that best reflected tortoise distribution and movement needs along the railroad track. To further minimize potential risk of injury from train traffic, and for a minimum of three years, an approved biologist would precede each train trip to remove any tortoises on or adjacent to the railroad tracks. Tortoise observations would be plotted to document important use areas and refine the design of

the culvert/drift fence system.

(Memorandum dated Sept. 30, 1998, from FWS to California State Director, at 2.) The Board of Land Appeals does not have authority to review the merits of biological opinions issued by FWS under authority of section 7 of the ESA, 16 U.S.C. § 1536 (1994). Thus, an FWS Biological Opinion is not subject to administrative review as to the matters decided therein. *Southern Utah Wilderness Society*, 128 IBLA 52, 60-61 (1993); *Lundgren v. Bureau of Land Management*, 126 IBLA 238 (1993). We accordingly accept the Biological Opinion's finding that impacts to the desert tortoise from train traffic will be effectively minimized. We are not persuaded that any adverse impacts to the desert tortoise from completion of the Project have been disregarded, such that approval of the exchange would not benefit acquisition of habitat.

We reject appellant NPCA's argument (NPCA SOR at 5-6, Reply Brief at 4-5) that BLM was required by 43 C.F.R. § 2200.0-6(b) to make a finding whether the "intended use of the conveyed Federal lands" would "significantly conflict with established management objectives on" JTNP as "adjacent Federal lands." The closest point between the selected public lands and JTNP is in the NE 1/4 sec. 11, T. 4 S., R. 14 E., San Bernardino Meridian. There is a strip of lands between the selected public lands and the JTNP lands. *See* ROD Ex. B. Thus, the selected public lands (conveyed Federal lands) are not "adjacent to" any JTNP lands. As noted above, BLM's decision documents fully treat the question whether and to what extent the land exchange will

conflict with JTNP. However, BLM is not required by regulation to find that the intended use of the selected public lands as a landfill does not significantly conflict with established management objectives on JTNP.

The Charpieds assert that the selected public lands were not "categorized for disposal" (Charpieds' SOR at 4), thus suggesting that the exchange "significantly conflict[s] with established management objectives on adjacent Federal lands" in violation of 43 C.F.R. § 2200.0-6(b). We reject that contention. Under 43 C.F.R. § 1610.5-3(a), "[a] future resource management authorizations and actions *** shall conform to the approved plan." Moreover, it is clear that a land exchange, as a resource management action, is not barred because the governing plan does not "expressly provide for" the exchange. Under 43 C.F.R. § 1601.0-5(b), "[c]onformity or conformance means that a resource management action shall be specifically provided for in the plan, *or if not specifically mentioned, shall be clearly consistent with the terms, conditions, and decisions of the approved plan or plan amendment.*" (Emphasis supplied.) Under 43 C.F.R. § 1601.0-5(c), "['c]onsistent[']' means that [BLM] plans will adhere to the terms, conditions, and decisions of officially approved and adopted resource related plans." Therefore, the "exchange need not be specifically mentioned, so long as it is clearly consistent with the plan." *Northern Plains Resource Council v. Lujan*, 874 F.2d 661, 669 (9th Cir.1989).

BLM, following 43 C.F.R. § 2200.0-6(b)(2), correctly held that "[t]he adjacent Federal lands are

managed by the BLM under the Plan and are designated as Class M [(moderate use)] to the south and east and Class I [(intensive use)] to the north of the Project." It expressly determined that the Project "does not conflict with the current uses or uses allowed by the CDCA Plan for the adjacent Federal lands" managed by BLM under the CDCA plan. (ROD at 8; State Director's Decision dated Dec. 9, 1998, dismissing Charpieds' protest at 4; State Director's Decision dated Dec. 9, 1998, dismissing NPCA's protest at 3.) That conclusion is supported by the case record, which shows that the lands that are adjacent to the exchanged lands are Federal public domain lands that, owing to their proximity to the historically active mining area, have been made available for use rather than placed within JTNP.

Further, the CDCA Plan provides that areas designated as Class M or Class I "will be acquired, disposed of, or exchanged in accordance with FLPMA and other applicable Federal laws and regulations, to assure more efficient management of the public lands and to reduce conflicts with other public and private landowners to provide more consistency and logic in desertwide land use patterns." (CDCA Plan, § II.B.11.) Further, as BLM noted in the ROD, granting the land exchange and rights-of-way conforms with the CDCA Plan of 1980, *as amended*. Although the current guidelines (Amendment 4 of the 1985 Amendments to the CDCA Plan) dictate that "Federal lands managed by BLM may not be used for waste disposal (either hazardous or non-

hazardous),"[24] they nevertheless provide that "[l]ocations suitable for waste disposal, when found on BLM managed Federal lands, *will be transferred to other ownership through sale or exchange.*" (ROD at 8 (emphasis supplied).) The lands, having been found suitable for waste disposal, were categorized in the CDCA Plan for transfer out of Federal ownership via exchange. Disposal of these lands via exchange is clearly "consistent with" the CDCA Plan.

Appellants cite statutes that, they assert, require that the resources of JTNP be left unimpaired. None of these statues is of comfort to them. The California Desert Protection Act, 16 U.S.C. § 410aaa-21 (1994), was enacted against a background clearly showing Congressional intent that the Project not be impeded by that legislation. The House Natural Resources Committee Report contains the following statement:

> The Committee recognizes that there is a proposed Eagle Mountain solid waste disposal facility which, if developed, would be located at the site of the defunct Kaiser iron ore mine with approximately 1.5 miles of the Joshua Tree National Park. It is not the intent of the Committee that this legislation have any effect on the future development of this disposal facility at that location, and [the Committee] does not expect that such development will be affected by the site's

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[24] This policy was adopted to avoid placing the Federal Government in a position where it might be liable for damages resulting from operating a waste disposal facility.

> proximity to the park or wilderness within the park. The Committee notes that any such development will first have to meet the requirements of various federal, state, and local laws and regulations in order to be licensed; the Committee does not intend that this legislation be construed so as to impose additional regulation, beyond such current federal, state and local laws or regulation, based on the mere fact that the Eagle Mountain site is in close proximity to the park or wilderness within the park, should this facility be located at that site.

H.Rep. No. 103-496, May 10, 1994. The National Park Service Organic Act of 1916, *as amended*, 16 U.S.C. § 1 (1994), establishes NPS' mission and role, but does not impose specific legal requirements or restrictions on the management of Federal lands outside the jurisdiction of the NPS. In any event, it cannot be denied that BLM fully complied with the directive that "unique characteristics of the geographic area such as proximity to *** park lands" must be considered in evaluating impact significance. 40 C.F.R. § 1508.27(b)(3).

The Wilderness Act of 1964, 16 U.S.C. § § 1131-1136 (1994), *as amended*, of course, does impose restrictions on the treatment of lands designated as wilderness.[25] However, the record shows that the

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[25] The majority of lands within JTNP are designated as wilderness. (Draft EIS/EIR at 4.11-2.) The Charpieds (Charpieds' SOR at 24-25) challenge BLM's decision to apply

less strict noise standards for those lands that are not wilderness. (Draft EIS/EIR at 4.13-1 to 4.13-2.) Wilderness is, by definition, an area where "the imprint of man's work [is] substantially unnoticeable." *See* 16 U.S.C. § 1131(c) (1994). BLM adoption of a stricter noise standard for wilderness is consistent with its obligation to administer those lands "in such a manner as will leave them unimpaired for future use and enjoyment as wilderness." *See* 16 U.S.C. § 1131(a) (1994). No such nonimpairment mandate exists for the nonwilderness lands.

The Court of Appeal ruled on this issue. It noted the "evidence of human development" found in the nonwilderness lands in JTNP and the "County's acceptance of different thresholds of significance for impacts upon different areas of [JTNP,] depending on [their] level of wilderness." *NPCA II, supra* at 18. It held:

"We conclude that for purposes of analyzing the various 'wilderness experience' components, there is substantial evidence in the record to support the approach taken by the [EIS/EIR] and the County, to distinguish the significance of impacts according to the scientific and factual data gathered about the nature of the land affected: wilderness or nonwilderness." *Id.* at 19-20. The Court of Appeal also ruled that "the record does not support any claim that no impacts from the project, whether significant or not, whether in a wilderness area or not, should be allowable, merely because of the proximity of the project to" JTNP. *Id.* at 20. It also noted that "the significance of an activity may vary with the setting" and specifically ruled that "the County had a substantial basis for accepting the [EIS/EIR's] use of county noise standards for assessing noise impacts" in the nonwilderness areas, as "[t]here is no requirement that all noise from the [P]roject be mitigated to a level of inaudibility, particularly as to nonwilderness parklands." *Id.* at 22.

We find no basis in Federal law to conclude that no impacts should be allowable on nonwilderness areas of JTNP. We regard the EIS/EIR's distinction between effects on wilderness and

EIS/EIR carefully took into account those restrictions in evaluating the Project's impacts. See Draft EIS/EIR at Secs. 3.11 and 4.11. The only effects identified on the "wilderness as a resource" are that the Project will be "noticeable during operation and after final closure to some locations within *** the JTNP wilderness areas," and that "a small amount of windblown debris could be transported within the JTNP boundaries." (Draft EIS/EIR at 4.11-13 to 4.11-14.) The record shows that there is a community to the west of the project (Draft EIS/EIR Fig. 3.11-9) and mountains to its north and west. (Draft EIS/EIR Fig. 3.1-9.) There are 1-to-3-mile non-wilderness strips both to the south and northwest of the Project. (Draft EIS/EIR Fig. 3.11-9) All of these features effectively buffer the Project site from wilderness lands in the eastern part of JTNP and to the north of the Project site. (Draft EIS/EIR. Fig. 3.5-3; Final EIS/EIR at 6-25.) We are accordingly convinced that visual impacts and blowing trash on wilderness lands in JTNP will be minimal. The presence of these effects does not compel reversal of BLM's finding that the public interest will be well served by approval of the exchange. Similarly, although BLM acknowledges that some individuals' subjective "wilderness experience" may possibly be impacted by the presence of the Project (Draft EIS/EIR at 4.11-14) and that there is nothing that can be done to prevent that, we do not regard such impacts as compelling reversal of BLM's decision here.

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nonwilderness lands in JTNP to be well supported by governing law.

Section 206(b) of FLPMA requires that the values of the public and private lands exchanged be equal or equalized by the payment (absent waiver in appropriate circumstances) of not more than 25 percent of the total value of the land transferred out of Federal ownership. 43 U.S.C. § 1716(b) (1994); 43 C.F.R. § § 2201.3(a) and 2201.5(c)(2); See *Brent Hansen*, 128 IBLA 17, 19 (1993); *Havasu Heights Ranch & Development Corp.*, 102 IBLA 1, 7-8 (1988).

The Charpieds assert that BLM undervalued the selected public lands taken by KEM in the exchange (Charpieds' SOR at 1-2), suggesting that it did not meet the requirements of 43 C.F.R. § § 2201.3(a) and 2201.5(c)(2). NPCA also argues that BLM will not receive fair market value for the exchange. (NPCA SOR at 5-6.) It is well established that a party challenging an appraisal determining fair market value is generally required to either show error in the methodology used in determining fair market value or, alternatively, submit its own appraisal establishing fair market value. *See Voice Ministries of Farmington, Inc.*, 124 IBLA 358, 361 (1992); *High Country Communications, Inc.*, 105 IBLA 14, 16 (1988). Appellants have submitted no appraisal here. Nor have they shown error in the methodology of the appraisal. We accordingly do not agree that the public is not receiving full value for the selected public lands. In these circumstances, the BLM appraisal is properly upheld. See, e.g., *Brent Hansen*, 128 IBLA at 19; *City of Santa Fe (On Judicial Remand)*, 120 IBLA at 315; *Burton A. McGregor*, 119 IBLA at 105.

We specifically reject the Charpieds' argument

(SOR at 1) that BLM failed to properly value the reversionary interest in the tract of land they describe as the campsite/millsite lands.[26] BLM instructed the appraisers to appraise the reversionary interest in the surface estate of the tract in terms of the "fee simple estate, disregarding the [e]ffect of any title encumbrances," including the reversionary interest, and to appraise the tract "as if in a raw, unoccupied state, disregarding any of the existing improvements." (Appraisal Report, Vol. II, at iv, 4, 14.) The record indicates that these instructions resulted from an agreement between BLM and KEM which was designed to resolve the problem of how to appraise the reversionary interest, under which KEM agreed to pay for the full fee simple title to the campsite/millsite lands even though it already held the principal interest in those lands. (Letter to BLM from KEM dated May 5, 1993.) The surface estate was patented to KSC in 1955 and was being held subject only to KEM's continued compliance with the terms of the patent. So long as it did so, KEM could hold the surface estate indefinitely, subject to the possibility of reverter. We find no fault with this compromise, and appellants

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[26] Appellant NPCA argues that the offered private land (referred to as "the acquired land") "may already be federal land" because, it asserts, title had reverted to the United States, so that "the federal government may be gaining land it already owns." (NPCA SOR at 6.) Respondents (Answer at 50) point out that NPCA completely misunderstands the facts. In fact, there is no reversionary language in the deeds of any of the offered private lands, which Kaiser owns in fee. There is, accordingly, no possibility that the Federal Government already owns any of the offered private lands.

have provided no basis to disturb it. To avoid even the possibility of under-valuing its reversionary interest, BLM instructed the appraiser to value that interest as if it were a fee simple interest in the surface estate of the land, that is, as if the reverter had occurred.[27] This undoubtedly increased the value attributable to the reversionary interest, thus maximizing its value for purposes of the exchange and benefitting the United States by increasing the overall value of the selected public lands in the exchange.

We also reject the Charpieds' argument (Charpieds' SOR at 1) that, by disregarding revenue from improvements that have been built on the campsite/millsite lands, BLM undervalued the reversionary interest. That argument disregards the critical fact that, if the lands ever had reverted to the United States, those improvements could be removed. Such improvements and associated "revenue stream" belong to KSR and its successors, not to the United States, which has no claim to reimbursement for their value.

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[27] We do not agree with the Charpieds that, by setting the value of the campsite as the value of the fee simple interest of that tract, BLM admitted that the lands had reverted to public ownership. (Charpieds' SOR at 3.) Nor do we view BLM's listing of these lands as "selected public lands" on the appraisal report as an admission that the lands had reverted. (Charpieds' SOR at 10.) Contrary to the Charpieds' suggestion, the ROD makes clear that KEM is selecting the "Federal Reversionary Interest" in these lands. (ROD, Ex. A-1, p. 3.) We see nothing remotely suggesting that BLM has ever admitted that title to the lands has reverted to the United States.

By the same token, the valuation of the offered private lands is not defective because it did not include the value of railroad tracks which cross the property (*see* Charpieds' SOR at 2), as those improvements will not belong to the United States following the exchange, but will remain in Kaiser's possession on the property under authority granted by the right-of-way. In these circumstances, it was appropriate to value the lands "as if in a raw, unoccupied state, disregarding any of the existing improvements," (Appraisal Report, Vol. III at 5, 23), as those improvements can be removed by the right-of-way holder.

The Charpieds assert that the appraisal misstates the present use classification of the selected public lands as "designated for Open Space and Conservation." (Charpieds' SOR at 1-2.) We are unable to find such statement, and the Charpieds provide no citation. The Appraisal Report expressly states to the contrary that the selected public lands were "appraised based on [their] estimated highest and best use as if available in the open market, in accordance with the underlying zoning regulations, County of Riverside General Plan land use recommendations, and [CDCA] Plan land use recommendations" (Appraisal Report Vol. I at 43-44), concluding, in view of the absence of "imminent development potential," that "the highest and best use of the selected public lands is estimated to be holding for speculative investment and future capital appreciation." *Id.* at 47.

The Charpieds argue that the Notice of

Exchange Proposal (NOEP) violated 43 C.F.R. § 2201.2(a)(1), because it failed to name Kenneth Statler as a party "involved in the present exchange." (Charpieds' SOR at 2.) Appellants have failed to show that Statler, who apparently at one time held a leasehold interest in a portion of the campsite lands that has now expired, owns any interest in the lands involved in the exchange. Accordingly, we agree with KEM that he is not "involved in the present exchange" and need not have been identified under 43 C.F.R. § 2201.2(a)(1). Nor did the NOEP need to mention MWD (Charpieds' SOR at 20), which is not a participant in the exchange, but is instead the grantee of a right-of-way.

The Charpieds also argue that the NOEP violated 43 C.F.R. § 2201.2(a)(2) by not identifying 400 acres of desert tortoise habitat that KEM will donate to BLM. That "donation" is actually being made as mitigation for the expected loss of desert tortoise habitat caused by the widening of Eagle Mountain Road. We agree with KEM that it was not required to list those lands in the NOEP because, at the time of the preparation of that document, the extent of loss of habitat was not known and could not have been accurately foreseen. At this time, KEM has committed itself (as a condition of the land exchange agreement) to purchase 400 acres of tortoise habitat and donate it to the United States for preservation to mitigate expected damage to 160 acres of tortoise habitat resulting from the widening of Eagle Road. We find nothing impermissible in that. The valuation of the selected public land and offered private lands are not affected. Public involvement in this process can await the execution of the arrangement,

Both NPCA and the Charpieds argue that BLM erred by failing to take into account that title to the campsite/millsite lands had reverted to the United States because the terms of the reverter in the patent had occurred. Indeed, they presume that title to the lands has reverted and make further assumptions accordingly. *See, e.g.*, Charpieds' SOR at 2-3 (asserting that KEM's occupancy of these lands is trespass, and challenging the legality of a lease of surface rights issued by KEM to Statler). In view of the fact that BLM has agreed to deed its interest in the lands (whatever it may be) to KEM, this land exchange will resolve these questions once and for all.[28] As noted above, BLM has valued the campsite/millsite lands as if the land had already reverted to the United States. This moots the question of whether title to the lands has, in fact, reverted. In other words, since BLM has received the same value for the lands as it would have if the lands had reverted to the United States, it is unnecessary to consider whether the lands have or have not actually reverted to the United States, because the United States is in the same position either way.

Nevertheless, we affirm BLM's finding that the lands have not reverted. (ROD at 19; State Director's Decision dated Dec. 9, 1998, dismissing Charpieds' protest at 5; *see also* State Director's Decision dated

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[28] We find nothing improper in BLM's choosing to use the land exchange authority of FLPMA to accomplish this goal instead of the recordable disclaimer authority, as suggested by the Charpieds. (Charpieds' SOR at 10.)

Dec. 9, 1998, dismissing NPCA's protest at 4.) The record shows that these lands were patented to KSC pursuant to the Act of July 8, 1952, Priv.L. 790, 66 Stat. A129, on Aug. 9, 1955, pursuant to Patent Los Angeles 0121702, and that the patent contains the following provision:

> PROVIDED, That said property shall revert in fee to the United States in the event that said property is not used for a continuous period of seven years as a camp site or mill site or for other incidental purposes in connection with the mining operations of said Kaiser Steel Corporation or its successors in interest.

Even if, upon the happening of an event named in the reverter, the estate automatically terminates and the property reverts to the grántor or his successors-in-interest without the necessity for re-entry (*see State of Wyoming*, 27 IBLA 137, 164, 83 I.D. 364, 383 (1976) (AJ Frishberg, dissenting), aff'd, 602 F.2d 1379 (10th Cir.1979)), there must be a finding that the event has, in fact, happened. Such a finding by BLM is ordinarily the necessary first step in the Department's effectuating a reversion. *See, e.g., Sky Pilots of Alaska*, Inc., 40 IBLA 355, 365 (1979); *City of Monte Vista, Colorado*, 22 IBLA 107, 114 (1975); *Clark County School District*, 18 IBLA 289, 297-98, 82 I.D. 1, 5 (1975) [29] BLM has not made such a

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[29] The Charpieds and NPCA both argue that BLM lacks authority to determine whether the reverter has taken place, and that the reverter has occurred automatically, despite BLM's

finding here, and has affirmatively held that "the reversionary interests of the United States have not been triggered." (ROD at 19.) We agree.

California law governs disposition of this question, since Congress did not indicate in Priv.L. 790 that it intended for Federal law to apply. *See State of Idaho v. Hodel*, 814 F.2d 1288, 1293 (9th Cir.), *cert. denied*, 484 U.S. 854 (1987). Under California law, "there is a general legislative and judicial hostility to divestiture of properties long held by grantees." *Id.* at 1291. The California Civil Code provides that "[a] condition involving forfeiture must be strictly interpreted against the party for whose benefit it is created." Cal.Civ.Code § 1442. In accordance with this general policy, forfeiture and reversion provisions in deeds and patents are "construed liberally in favor of the holder of the estate, and construction which avoids forfeiture must be adopted if at all possible," such that "[e]ven a breach of a condition may not result in forfeiture if the grantee has 'substantially complied' with the terms of the conveyance." *State of Idaho v. Hodel*, 814 F.2d at 1292.

The question examined by BLM is whether KSC and KEM, as successor to the grantee of Patent Los Angeles 1153422, failed to use the patented lands for

---

lack of action. We note that, although a party with standing to raise the issue could presumably sue in a court of competent jurisdiction either to gain a declaratory judgment that title had reverted or to quiet title based on the operation of the reverter, that has not happened.

a continuous period of 7 years as a campsite or millsite or for other incidental purposes in connection with the mining operations of KSC or its successors-in-interest. The State Director, in dismissing the Charpieds' protest, found at page 5 that "Kaiser has continued to make shipments of ore and other mineral materials and engaged in other activities incidental to mining at the site," and the record supports that finding. Although extraction and processing activities have ended, KEM has continued to use the land to coordinate the sale and shipment of iron ore and other materials that were generated during the mining process[30] and to coordinate the annual assessment work on unpatented mining claims in the area, as well as to support reclamation work on the minesite. That unquestionably amounts

---

[30] Respondents assert that, "[w]hen mineral extraction and processing activities were discontinued in 1983, hundreds of millions of tons of mining products were stockpiled at the site, including pelletized iron ore concentrates, aggregate, rip-rap, crushed rock, and decorative rock. Rather than abandoning those valuable assets, Kaiser assembled, loaded-out and shipped more than 130,000 tons of iron ore, 64,000 tons of aggregate, and 394 tons of riprap from the Eagle Mountain site to various locations between 1985 and 1992. Each shipment involved the use of the campsite and Kaiser personnel and equipment located there. In addition, Kaiser also used the campsite to process and ship several tons of coarse ore and pelletized ore from the mine in March and April of 1993."

(KEM/MRC Answer at 39-40 (citations omitted).) Appellants have not disputed these facts. Those activities were sufficient to extend KEM's title in the lands at least through April 2000, since, as Respondents point out, there has not been a continuous period of 7 years in which Kaiser failed to ship iron ore or other mineral materials from the minesite.

to using the lands "for incidental purposes in connection with mining operations." [31]

Nor do we accept the Charpieds' argument (Charpieds' SOR at 11) that the devotion of a portion of the lands to a use unrelated to mining (as a privately-owned correctional facility) triggered the reverter. The language of the reverter makes it clear that, for the reverter to operate, there must be failure to use the site for purposes incidental to mining; use of a small portion of the lands for other purposes than mining does not trigger the reverter where the site is also used as required. Finally, we reject the Charpieds' argument that title to these lands somehow reverted to the United States when KSC went bankrupt. (Charpieds' SOR at 12-13.) The patent was issued to "Kaiser Steel Corporation and to its successors," thus obviously including KEM and other entities that may have succeeded to KSC's title following its bankruptcy.

The Charpieds also argue that right-of-way LA-0121701 (issued to KSC in June 1956 to allow access to the iron ore mining operation, also under authority

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[31] Neither KEM's asserted failure to seek permission for "mining activities" nor its failure to gain mining permits are relevant to the question of whether the reverter occurred. We note, however, that the Charpieds' evident presumption that KEM must have engaged in "mining" to avoid the operation of the reverter is incorrect. KEM did not have to engage in "mining" or "mining operations" to avoid the reverter; it simply had to use the lands "for incidental purposes in connection with mining operations," something it clearly did when it sold and shipped previously-mined iron ore or other mineral materials.

of the Act of July 8, 1952, *supra*) reverted to the United States. (Charpieds' SOR at 4.) Even assuming *arguendo* that the reversion occurred, there is nothing preventing BLM from issuing a new right-of-way for other purposes. BLM has the authority to do so under FLPMA, and the records establish that its decision was within its authority. We reject the argument that activities undertaken on the right-of-way were unauthorized, as the record shows that right-of-way LA-0121701 was in effect during the time in question. [32]

The decision whether to proceed with a proposed land exchange, especially the determination whether it is in the public interest, is committed, by section

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[32] In any event, we are not persuaded that the events that would invoke the reverter of the right-of-way have occurred. The right-of-way grant provides that it must be used for "constructing, operating, and maintaining any and all works, structures, facilities, roads, railroads, power lines, and pipelines necessary, convenient, incidental, or appurtenant to the operation of the mines, camp sites and mill sites." It provides further that it "shall be subject to reversion if the rights are abandoned or not used for a continuous period of seven years by [KSC] or its successors in interest." It is plain from this language that *any* acts taken to operate or maintain facilities appurtenant to operation of the mine will avoid the reverter. There is no doubt that such activities have occurred on the right-of-way throughout the period in question. The use of the right-of-way to carry shipments of iron ore via rail is sufficient, by itself, to prevent it from reverting.

Contrary to the Charpieds' suggestion (Charpieds' SOR at 5), those activities were not "new activity," but were undertaken pursuant to existing authority of right-of-way LA-0121701. We are not aware that that right-of-way ever terminated.

206(a) of FLPMA and 43 C.F.R. Part 2200, to the discretion of BLM. 43 U.S.C. § 1716(a) (1994); 43 C.F.R. § 2200.0-6(a); *San Carlos Apache Tribe*, 149 IBLA 29, 48 (1999); Antonio J. Baca, 144 IBLA 35, 36-37 (1998); Barrett S. Duff, 122 IBLA 244, 247 (1992). It will not be overturned unless the party challenging it demonstrates that it is contrary to the law, arbitrary and capricious, not supported on any rational basis set forth in the record, or, for any reason, not in accordance with the public interest. Brent Hansen, 128 IBLA 17, 21 (1993).[33] Appellants have not met that burden here.

The State Director stated as follows concerning issuance of the two rights-of-way:

> Additionally, it is my decision to issue two (2) right-of-way grants [(CACA 35594 and CACA 31926)] under the authority of and in accordance with Title V of [FLPMA], as amended, to [KEM] to enable operation of the Eagle Mountain Landfill and Recycling Center. One of the right-of-way grants is issued to [KEM], the other issued jointly to [KEM] and the [MWD]. The rights-of-way will be used in connection with the transportation of waste to the landfill site.

(State Director's Decision dated Dec. 9, 1998, dismissing Charpieds' protest at 6; State Director's Decision dated Dec. 9, 1998, dismissing NPCA's protest at 4.)

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[33] GFS(MISC) 2(1994)

Section 501(a)(6) of FLPMA, 43 U.S.C. § 1761(a)(6) (1994), authorizes the Department to grant rights-of-way over, upon, under, or through public lands for roads, trails, or other means of transportation. *See also* 43 U.S.C. § 1761(a)(7) (1994). Approval of rights-of-way is a matter of discretion. *John M. Stout*, 133 IBLA 321, 328 (1995); *Coy Brown*, 115 IBLA 347, 356 (1990). The Board will ordinarily affirm a BLM decision approving or rejecting a right-of-way application when the record demonstrates that the decision is based on a reasoned analysis of the factors involved, made with due regard for the public interest, and no reason is shown to disturb BLM's decision. *James Shaw*, 130 IBLA at 115; *Coy Brown*, *supra*. An appellant, as the party challenging BLM's decision, has the burden of showing adequate reason for appeal and of supporting the allegations with evidence demonstrating error. Conclusory claims of error or differences of opinion, standing alone, do not suffice. *Kings Meadow Ranches*, 126 IBLA 339, 342 (1993).

Many of the same considerations discussed above apply to BLM's decision to issue these rights-of-way. None of the indirect effects associated with the Project rise to the level that would render issuance of the rights-of-way, which make the Project possible, outside the public interest. Appellants have failed to show error in the decision to issue these rights-of-way, and we affirm BLM's conclusion that approval of these rights-of-way is in the public interest.

We note that appellants are mistaken in their assertion that "[r]ight-of-way Grant CACA-25594 was

authorized under the authority of" Priv.L. 790. (Charpieds' SOR at 4.) That right-of-way was authorized under section 501 of FLPMA. The absence of authority in the Act of June 18, 1932, 47 Stat. 324 (1932) (Charpieds' SOR at 7-8), is irrelevant to the controlling question whether BLM has the authority to issue the right-of-way under FLPMA. BLM is issuing a new right-of-way under the authority of FLPMA, which supersedes the earlier grant. The fact that the 1932 Act did not authorize use of a right-of-way in connection with a landfill is irrelevant; the question is whether FLPMA authorizes such use. BLM is not "usurping" Congress' authority as granted by the 1932 Act, as the Charpieds state; it is exercising different, independent authority under FLPMA. Nor have the Charpieds provided any evidence to support their apparent contention that granting the right-of-way will interfere with MWD's exercise of rights granted under the 1932 Act by polluting the water it provides to Southern California cities. (Charpieds' SOR at 7-8.)

To the extent not expressly addressed herein, appellants' arguments have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decisions appealed from are affirmed.

David L. Hughes

Administrative Judge

I concur:

_____

Bruce R. Harris
Deputy Chief Administrative Judge

APPENDIX D
BLM Decision
United States Department of the Interior

BUREAU OF LAND MANAGEMENT
California State Office
2135 Bulano Drive
Sacramento, CA 95825-0451
www.ca.blm.gov

CACA-30070
CACA-25594
CACA-31926
2200/2800(P)
(CA-930)

DEC 09 1998

Certified Mail
Return Receipt Requested

DECISION

Brian Huse, Director	:	Eagle Mountain
National Park and Conservation Assoc.	:	Land Exchange CACA-30070
P.O. Box 1289	:	Rights-of-Way CACA-25594 and
Oakland, California 94604-1289	:	CACA-31926

Protest Dismissed
Right-of-Way Grants CACA-25594 and CACA-31926 Issued

BACKGROUND

The Eagle Mountain Land Exchange was proposed on September 18, 1989, by Kaiser Eagle Mountain, Inc. (Kaiser). Kaiser proposes to exchange private land containing important wildlife habitat around the Chuckwalla Valley for public land in and around the Eagle Mountain Iron Mine. Some of the public land to be exchanged is substantially disturbed from the former active operation of the Eagle Mountain Iron Mine. Disposal of the selected public land by exchange conforms with the California Desert Conservation Area (CDCA) Plan of 1980, as amended.

ISSUE #1

The NOD is premature. Because of deficiencies in the original Environmental Impact Statement/Report (EIS/R) for the project, and its subsequent invalidation, the Superior Court has retained jurisdiction over the current EIS/R. Until such time as the court rules that the new EIS/R has satisfied all of the conditions of the Writ of Mandate, BLM cannot issue a NOD for a land exchange which could result in the impairment of public lands and the resources of Joshua Tree National Park.

RESPONSE #1

Riverside County and the BLM have distinct approval roles with respect to the project. The County's role is to approve or disapprove the landfill project itself in accordance with local land use laws and the California Environmental Quality Act (CEQA). BLM's role is to approve or disapprove the land exchange that is needed for the landfill project in accordance with the NEPA and the Federal Land Policy and Management Act, as amended. The Superior Court has jurisdiction to require the County to perform additional work under CEQA; it does not have jurisdiction to evaluate BLM's compliance with NEPA or FLPMA, nor does its decision preclude BLM from moving forward with approval of the land exchange. The BLM was aware of the ongoing Superior Court litigation when it issued its Record of Decision. The Department has considered the Superior Court's final ruling and found that the ruling does not change BLM's decision.

ISSUE #2

BLM has based the NOD on a Record of Decision which fails to respond to public comments. Repeated public comments which expressed the need to address the project's potential to harm the resources of Joshua Tree National Park (JTNP) were ignored by referencing an agreement between the National Park Service and the Mine Reclamation Corp [that] provided no further analysis nor was it even subject to public review.

RESPONSE #2

The EIS analyzed the potential impacts of the landfill on JTNP. The Final EIS contains specific responses to each of the comments submitted on the Draft EIS. The signed agreement between NPS and Kaiser/Mine Reclamation Corporation was independently initiated by those parties and was not required by BLM nor a part of the Federal action. The agreement was included in the Final EIS to ensure full public disclosure and an opportunity for comment.

ISSUE #3

The land exchange has the potential to impact Federally Listed desert tortoise. BLM's stated premise that the land exchange will result in BLM receiving critical habitat is without merit. The scattered tracts of land which MRC is exchanging lie directly on the rail right of way and would lose any value once trains begin operating. Not only will the presence of trains impact the tortoise, but also the tracks themselves will segment habitat, limiting genetic diversity.

RESPONSE #3

The EIS addresses the issue of trains and an existing rail line's potential to impact desert tortoise. The U.S. Fish and Wildlife Service's 1992 Biological Opinion requires a number of mitigation measures to address this issue, such as a monitoring program for a minimum of three (3) years that requires an inspection of the rail line before each train trip to remove tortoise which may be in harm's way. At the end of the 3-year period, or earlier if deemed appropriate by the USFWS and BLM, this

monitoring program will be evaluated to determine which areas warrant placement of a barrier/culvert system to assist tortoises in crossing the tracks. Various other mitigating measures will be implemented to minimize habitat fragmentation resulting from the rail line. The USFWS reaffirmed its earlier 1992 Biological Opinion that the project with mitigation is not likely to jeopardize the continued existence of the desert tortoise and desert pupfish, nor will the project result in adverse modification or destruction of critical habitat for these species. More recently in a September 30, 1998 memorandum, the USFWS concluded that the state court's May 6, 1998, decision in *National Parks and Conservation Association v. County of Riverside* does not warrant re-initiation of the section 7 consultation process for the project and again reaffirmed the validity of its 1992 Biological Opinion. The exchange will consolidate a fragmented land ownership pattern, allowing for more effective land management.

ISSUE #4

The land exchange fails to meet the required test of being in the best interest of the American public. Impacts to air quality, Joshua Tree National Park, and congressionally designated wilderness cannot be exchanged for piecemeal tracts of land with no value to the public.

RESPONSE #4

The determination of public interest served by the land exchange was made pursuant to Section 206 of

the Federal Land Policy and Management Act of 1976, as amended (FLPMA). This determination was based in part on a finding that there is no significant conflict with management objectives on adjacent lands, which are managed by BLM. These findings were based on the analysis of potential impacts and mitigation measures in the EIS.

ISSUE #5

The NPCS questions the appraisal of and fee payment for excess BLM exchanged lands.

RESPONSE #5

Section 206 of The Federal Land Policy and Management Act of 1976, as amended, requires that exchanges of land or interest therein be for equal value. The independent appraisals of the offered private and selected public lands in the exchange were prepared in accordance with the requirements of The Federal Land Policy and Management Act, as amended, and the implementing regulations at Title 43 Code of Federal Regulations 2201.3 *et seq*. Based on the appraisals of the offered and selected lands that were reviewed and approved by BLM, this is an equal value exchange.

ISSUE #6

The NOD and land exchange violate the National Park Service Organic Act of 1916 and the 1978 "Redwood Amendments". These two statues impose a general duty on all federal agencies to avoid any "impairment" or "derogation" of the protected resources of our national parks or of the experience of

visitors within these parks. That the National Park Service has consistently opposed the Eagle Mountain Landfill because of its potential to impact park resources requires BLM to deny the land exchange.

RESPONSE #6

The National Park Service Organic Act of 1916 and the 1978 Redwood Amendments establish the National Park Service's mission and role, but do not impose specific legal requirements or restrictions on the management of Federal lands located outside the jurisdiction of the National Park Service (NPS). The EIS described these statutes and how they provide the framework for NPS's management plans and policies for JTNP. The NPS participated in the preparation of the EIS as a cooperating agency, and mitigation and monitoring measures were included in the EIS to address its concerns. After considering the NPS's comments, the BLM as lead agency decided that the land exchange is in the public interest and should be approved.

ISSUE #7

BLM cannot exchange public lands for private lands which are in dispute of ownership. The reverter clause of Public Law 790 causes Kaiser patented lands to revert to federal ownership if those lands are not actively mined for a period of 5 years.

RESPONSE #7

There is no dispute over the ownership of the 2,846 acres of private lands that Kaiser is conveying to BLM as part of the land exchange. As for the lands

patented to Kaiser under Private Law 790, Kaiser received the lands in fee subject only to the possibility of the reverter. The Department of Interior Regional Solicitor stated in his Opinion on this subject that exercise of the reversionary clause is not automatic but on the election of the Secretary of the Interior. Kaiser has continued to make shipments of ore and other mineral materials and engaged in other activities incidental to mining at the site. These activities do not support the applicability of the reversionary clause and BLM has determined that exercise of the reverter is inappropriate.

CONCLUSION

Based on the foregoing and the documentation contained in the case record, I have determined that the Record of Decision, dated September 25, 1997, issued by the Authorized officer of the Bureau of Land Management, California Desert District Office, is in accordance with the regulations found in Title 43 Code of Federal Regulations 2200. I conclude that the public interest will be well served by completion of this exchange transaction and your protest is hereby dismissed.

Additionally, it is my decision to issue two (2) right-of-way grants under the authority of and in accordance with Title V of the Federal Land Policy and Management Act, as amended, to Kaiser to enable operation of the Eagle Mountain Landfill and Recycling Center. One of the right-of-way grants is issued to Kaiser, the other issued jointly to Kaiser and Metropolitan Water District. The rights-of-way will be used in connection with the transportation of

waste to the landfill site. Copies of the right-of-way grants are available upon request from the BLM California Desert District Office, 6221 Box Springs Blvd., Riverside, CA 92507 (ph 909-697-5200).

This decision may be appealed to the Interior Board of Land Appeals, Office of the Secretary, in accordance with the regulations contained in 43 CFR Part 4 and the enclosed Form 1842-1. If an appeal is taken, your notice of appeal must be filed in this office (at the above address) within 30 days from receipt of this decision. The appellant has the burden of showing that the decision appealed from is in error.

If you wish to file a petition pursuant to regulation 43 CFR 4.21- (58 FR 4939, January 19, 1993) and/or 43 CFR 2804.1 for a stay of the effectiveness of this decision during the time that your appeal is being reviewed by the Board, the petition for a stay must accompany your notice of appeal. A petition for a stay is required to show sufficient justification based on the standards listed below. Copies of the notice of appeal and petition for a stay must also be submitted to each party named in this decision and to the Interior Board of Land Appeals and to the appropriate Office of the Solicitor (see 43 CFR 4.413) at the same time the original documents are filed with this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provide by law or other

pertinent regulation, a petition for a stay of decision pending appeal shall show sufficient justification based on the following standards:

(1) The relative harm to the parties if the stay is granted or denied;
(2) The likelihood of the appellant's success on the merits;
(3) The likelihood of immediate and irreparable harm if the stay is not granted, and
(4) Whether the public interest favors granting the stay.

Ed Hastey

Ed Hastey
State Director

Enclosure – Form 1842-1

Form 1842-1
(February 1985)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

INFORMATION ON TAKING APPEALS TO THE BOARD OF LAND APPEALS

DO NOT APPEAL UNLESS

1. This decision is adverse to you,
AND
2. You believe it is incorrect

IF YOU APPEAL, THE FOLLOWING PROCEDURES MUST BE FOLLOWED

1. NOTICE OF APPEAL	Within 30 days file a *Notice of Appeal* in the office which issued this decision (see 43 CFR Secs. 4.411 and 4.43). You may state your reasons for appealing, if you desire.
2. WHERE TO FILE NOTICE OF APPEAL	BUREAU OF LAND MANAGEMENT CALIFORNIA STATE OFFICE 2135 BUTANO DRIVE SACRAMENTO, CA 95825-0451
SOLICITOR ALSO COPY TO	OFFICE OF THE REGIONAL SOLICITOR U.S. DEPARTMENT OF THE INTERIOR 2800 COTTAGE WAY, ROOM E-1712 SACRAMENTO, CA 95825-1890
3. STATEMENT OF SEASONS	Within 30 days after filing the *Notice of Appeal*, file a complete statement of the reasons why you are appealing. This must be filed with the United States Department of the Interior, Office of the Secretary, Board of Land Appeals, 4015 Wilson Blvd., Arlington, Virginia 22203 (see 43 CFR Sec. 4.412 and 4.413). If you fully stated your reasons for appealing when filing the *Notice of Appeal*, no additional statement is necessary.
SOLICITOR ALSO COPY TO	OFFICE OF THE REGIONAL SOLICITOR U.S. DEPARTMENT OF THE INTERIOR 2800 COTTAGE WAY, ROOM E-1712 SACRAMENTO, CA 95825-1890
4. ADVERSE PARTIES	Within 15 days after each document is filed, each adverse party named in the decision and the Regional Solicitor or Field Solicitor having jurisdiction over the State in Which the appeal arose must be served with a copy of: (a) the *Notice of Appeal*, (b) the Statement of Reasons, and (c) any other documents filed (see 43 CFR Sec. 4.413). Service will be made upon the Associate Solicitor, Division of Energy and Resources, Washington, D.C. 20240, instead of the Field or Regional Solicitor when appeals are taken from decisions of the Director (WO-100).
5. PROOF OF SERVICE	Within 15 days after any document is served on an adverse party, file proof of the service with the United States Department of Interior, Office of the Secretary Board of Land Appeals, 4015 Wilson Blvd., Arlington, Virginia 2203. This may consist of a certified or registered mail "Return Receipt Card" signed by the adverse part (see 43 CFR Sec. 4.401C(2)).

Unless these procedures are followed your appeal will be subject to dismissal (see 43 CFR Sec 4.402). Be certain that a communications are identified by serial number of the case being appealed

NOTE: *A document is not filed until it is actually received in the proper officer (see 43 CFR Sec. 4.401(a))*

APPENDIX E
BLM Record of Decision

U.S. Department of the Interior
Bureau of Land Management
California Desert District

RECORD OF DECISION
Eagle Mountain Landfill Project
Riverside County, California

Land Exchange CACA-30070
Right-of-Way Grant CACA-25594
Right-of-Way Grant CACA-31926

September, 1997
U.S. Department of the Interior
Bureau of Land Management
California Desert District
6221 Box Springs Boulevard
Riverside, California 92507

Cooperating Agencies:
National Park Service
Biological Resources Division, U.S. Geological Survey

RECORD OF DECISION

Eagle Mountain Landfill and Recycling Center
Project
Riverside County, California

Land Exchange CACA-30070

Right-of-Way Grant CACA-25594
Right-of-Way Grant CACA-31926

Approved:

_____ _____

Henri R. Bisson, District Manager Date

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United States Department of the Interior
Bureau of Land Management

RECORD OF DECISION

EAGLE MOUNTAIN LANDFILL PROJECT
California Desert District

1.0 INTRODUCTION.

This document constitutes the Record of Decision ("ROD") for the Eagle Mountain Landfill and Recycling Center Project ("Project"). The proposed action and alternatives are described, and their impacts analyzed, in the Final Environmental Impact Statement/Environmental Impact Report issued in January, 1997 ("EIS/EIR"). The Final EIS/EIR was prepared for the Bureau of Land Management ("BLM") in compliance with the National Environmental Policy Act, ("NEPA"), and the County of Riverside in compliance with the California Environmental Quality Act, California Federal Resources Code § 21000 *et seq.*, and regulations thereunder ("CEQA"), as joint lead agencies. The National Park Service and the Biological Resources Division, U.S. Geological Survey (formerly National Biological Service) acted as Cooperating Agencies under NEPA.

The federal action that precipitated the need for the EIS and this ROD was the application for a land exchange and rights-of-way by Kaiser Eagle Mountain, Inc., a Delaware corporation ("Kaiser"), whose address is 3633 E. Inland Empire Blvd., Suite 850, Ontario, CA 91764. One of the right-of-way

grants is to be held jointly by Kaiser and The Metropolitan Water District of Southern California ("MWD"), 1111 Sunset Boulevard, Los Angeles, CA 90054. The other right-of-way grant will be held by Kaiser. The land exchange and rights-of-way are a component in the proposed development of a Class III nonhazardous municipal solid waste landfill to be operated by Mine Reclamation Corporation, a California corporation ("MRC"), whose address is 43645 Monterey Ave, Suite A, Palm Desert, CA 92260.

2.0 DECISION.

I approve the land exchange as described in Section 2.1 below and Exhibits A and B with Kaiser as part of a Class III nonhazardous municipal solid waste landfill at Eagle Mountain. The final decision to issue the right-of-way grants to Kaiser and MWD, as described in Section 2.2, will be withheld pending receipt and review of any protest to the land exchange.

The Project proponent or its successors-in-interest must comply with all mitigation and monitoring measures designed for this Project and all stipulations, including those derived from the Biological Opinion prepared by the U.S. Fish and Wildlife Service.

Based on the environmental analysis of the proposed action and alternatives, I have determined that the land exchange and issuance of rights-of-way as conditioned by the adoption of mitigation and monitoring provision set forth in Exhibit C will not

cause unnecessary or undue degradation to Federal lands and resources and are in the public interest. Further, I have determined that the conveyance of the Federal lands will not significantly conflict with established management objectives on adjacent Federal lands.

The environmental analysis of the proposed action and alternatives and the mitigation and monitoring provisions, are described in the following documents: *Eagle Mountain Landfill and Recycling Center Project Final EIS/EIR (January, 1997); Eagle Mountain Landfill and Recycling Center Draft EIS/EIR* (July, 1996); the Biological Opinion for Eagle Mountain Landfill Project, U.S. Fish & Wildlife Service (September 22, 1992); "no jeopardy" confirmation (September 20. 1993): and memo continuing earlier Biological Opinion (September 30, 1996) by U.S. Fish and Wildlife Service.

2.1 Land Exchange (CACA-30070). Under the authority of and in accordance with Title II, Section 206 of Federal Land Policy and Management Act (FLPMA) of October 21, 1976, as amended, the BLM will dispose of Federal lands, including certain interests in Federal lands, and acquire lands with threatened and endangered species habitat and other environmentally sensitive lands. The Federal lands conveyed to Kaiser will be utilized in connection with the proposed landfill operation. The private lands conveyed to the BLM by Kaiser will become part of the California Desert Conservation Area (CDCA), pursuant to 43 C.F.R. § 2200.0-6(f), and will be managed in accordance with all laws, rules,

regulations and land use plans applicable to the CDCA and to special areas within the CDCA.

The legal descriptions of the Federal and non-Federal lands included in the exchange are shown in Exhibits "A-l" and "A-2," respectively, and displayed on the map attached as Exhibit "B." The serial number (casefile number) is CACA-30070. The Federal lands to be conveyed by the BLM to Kaiser consist of approximately 3,481 acres of BLM-administered lands in and around the site of the proposed Project, together with any and all interests of the United States in certain lands within and around the Kaiser Townsite previously patented to Kaiser pursuant to Private Law 790 ("PL 790") in 1955.

The non-Federal lands to be conveyed by Kaiser to the BLM consist of approximately 2,846 acres of lands containing threatened and endangered species habitat and other environmentally sensitive areas. Based on the appraised value of the exchange lands (see Section 6.1 below), a difference of $20,100 in favor of the United States has been determined between the Federal lands and the non-Federal lands. Because the Federal and non-Federal lands must be exchanged on an equal value basis, Kaiser will pay the cash value difference in the amount of $20,100 to BLM.

BLM will convey the Federal lands to Kaiser, subject only to the reservations and exceptions shown in Exhibit "A-l." Kaiser will convey the non-Federal lands to BLM, subject only to the reservations and exceptions shown in Exhibit "A-2." Such conveyances

shall include all of the parties' interest in the lands, including but not limited to any minerals, timber, grazing use, water or other interests, except for those interests specifically reserved and shown on Exhibits "A-l" and "A-2."

BLM has determined that certain lands within the proposed Project site are prospectively valuable for construction aggregates. As described in Exhibit "A-l," a reservation of all minerals in favor of the United States will be retained within these areas. If upon receipt of a plat submitted prior to patenting and showing areas where proposed surface use will preclude development of the reserved minerals, the United States shall reserve only a royalty interest in the area affected. The purpose of this reservation is to help insure the availability of construction aggregates in the Southern California market in the future. The United States will receive fair market value should any construction aggregates be severed, removed and sold for commercial purposes from the lands designated in Exhibit "A-l" as valuable for aggregate. The reservation will apply to Kaiser, its successors-in-interest, assigns, lessees, permittees and licensees.

In accordance with Section 206(a) of FLPMA and Section 2200.0-6 of the exchange regulations (43 CFR Part 2200), I have given full consideration to better Federal land management and the needs of State and local people and their economies. It is my determination that the resource values and Federal objectives on the BLM lands are less than the resource values and Federal objectives gained by acquisition of the non-Federal lands and, therefore,

this land exchange is in the public interest, and does not significantly conflict with established management objectives on adjacent Federal lands.

2.2 Rights-Of-Way. Under the authority of and in accordance with Title V of FLPMA, as amended, two right-of-way grants will be issued to Kaiser to enable operation of the Eagle Mountain Landfill and Recycling Center. One of the right-of-way grants will be issued to Kaiser; the other right-of-way grant will be issued jointly to Kaiser and MWD. The rights-of-way will be used in connection with the transportation of waste to the landfill site. MRC will have the use of the rights-of-way and will be bound by all stipulations applicable to the rights-of-way as the Kaiser lessee.

Kaiser Right-of-Way: Rail Line and Eagle Mountain Road Extension (CACA- 25594). A right-of-way comprising an aggregate of approximately 28.6 miles in length with an average minimum width of 200 feet and various widths for drainage purposes will be granted to Kaiser along the existing 52-mile Eagle Mountain rail line, on those portions of the rail line which currently traverse BLM managed lands, between Eagle Mountain and Ferrum Junction on the northeast coast of the Salton Sea. This right-of-way also includes a small portion of land for a new rail spur proposed to be constructed from the existing Eagle Mountain rail line to a container handling yard located within the Project site. It also includes the extension of Eagle Mountain Road going northeast from MWD's Eagle Mountain Pumping Station to the landfill site. This right-of-way for the road extension is approximately 3 miles

long and of variable width averaging 110 feet wide. The rail line and the extended Eagle Mountain Road are depicted within Exhibit "B."

Kaiser/MWD Right-of-Way: Eagle Mountain Road (CACA-31926). Waste transported by truck would access the landfill site over the existing Eagle Mountain Road and an extension of that road. A FLPMA right-of-way will be granted to Kaiser and MWD for joint use of the existing Eagle Mountain Road, beginning just north of Interstate 10 and ending just south of MWD's pumping station. This right-of-way is approximately 6.75 miles long and of variable width averaging 110 feet wide. The extended Eagle Mountain Road is depicted in Exhibit "B."

3.0 ALTERNATIVES INCLUDING THE PROPOSED ACTION.

Seven alternatives, including the Proposed Action, were evaluated in detail by the BLM and the County of Riverside. Details regarding the Proposed Action and alternatives are set forth in the Draft and Final EIS/EIR and are briefly summarized below.

3.1 The Proposed Action (BLM's Preferred Alternative). The proposed action (the Project), which is the BLM's preferred alternative, consists of (i) the BLM/Kaiser land exchange and FLPMA rights-of-way authorization, (ii) the proposed utilization and eventual reclamation of an abandoned deep pit iron ore mine located in Northeastern Riverside County, approximately 10 miles north of Interstate 10 in the vicinity of the communities of

Desert Center. Lake Tamarisk and Eagle Mountain for use as a Class III nonhazardous municipal solid waste landfill, and (iii) the renovation of the adjacent Eagle Mountain Townsite to provide housing for landfill workers and their families, and the consequent repopulation of the Townsite.

The landfill portion of the Project will comprise about 2,164 acres, and the remaining 2,490 acres will be used for landfill support facilities and open space. For the landfill a composite liner will be constructed and maintained beneath the base of the landfill and on the side slopes. Under the landfill Specific Plan's phasing requirements, the deepest end of the east pit will be the last area of the Project to be landfilled (approximately 75 years after start-up of landfill operations, if the County Development Agreement's 50-year term is extended prior to its expiration to at least 75 years), and a minimum depth to groundwater of 125 feet will be required in the deepest end of the east pit. The Project also comprises access improvements (including facilities for railroad and truck transport of refuse) and post-closure site reclamation and monitoring.

At full operation, the landfill will accept up to 20,000 tons per day of nonhazardous municipal solid waste from seven Southern California counties. However, the County of Riverside will initiate formation of an independent panel of scientists and engineers who will review compliance with approvals and permits before the proponent can proceed to accept waste from outside Riverside County in excess of 10,000 tons per day. Up to 18,000 tons of waste per day will be shipped in containers along the Southern

Pacific Railroad to Ferrum Junction. From there, the trains will use the 52-mile Eagle Mountain Railroad to the proposed landfill site. Up to 2,000 tons per day of containerized waste will be delivered by truck to the site. For the first three years of operation, waste will be transported to the landfill by either rail or truck from any of the seven source jurisdictions. After three years, waste from outside the desert areas of Riverside County will be transported only by train. The number of transfer trucks that will be accepted at the landfill site will be limited to 100 per day for the life of the Project.

Waste delivered to the landfill will be accepted only from solid waste facilities serving jurisdictions within the State of California that are in compliance with the California Integrated Solid Waste Management Act of 1989 (California Federal Resources Code Section 40000 *et seq.*, or "AB 939"), as more fully described in Development Agreement No. 64 approved by the County. All waste that arrives at the landfill site, other than local waste from the Chuckwalla Valley, will be accepted only after processing at properly permitted Materials Recovery Facilities or Transfer Stations. The waste will be inspected at three different points before disposal into the landfill.

The other component of the Project, the Eagle Mountain Townsite, is an existing, but under utilized, former mining community located directly south of the proposed landfill site on approximately 429 acres. The proposed renovation and repopulation of the Townsite will provide planning standards consistent with existing infrastructure already

located within the Townsite and improvements to the currently unoccupied housing stock, similar to the improvements previously made by Kaiser to the currently occupied homes within the Townsite.

3.2 No Action (Environmentally Preferable Alternative). The No Action alternative would leave the Project site in its present condition, and avoid the potential impacts of the proposed landfill. There would be no land exchange with or rights-of-way granted to Kaiser. The No Action alternative, however, would result in the continuation of the adverse visual impact of the disturbed former mining site and the remaining tailings piles. The potential direct and indirect impacts associated with"continued reliance on new or existing landfills in Southern California could produce adverse air quality impacts and/or ground water impacts at existing, unlined landfills. In addition, other Project objectives could not be achieved under the No Action alternative, including the acquisition and further federal consolidation of lands containing endangered and threatened species habitat. However, with respect to the impacts in the vicinity of the Project site, the No Action alternative is, on balance, the environmentally preferable alternative in terms of direct impact on the human environment.

3.3 Reduced Volume of On-Site Disposal. This alternative would allow for the disposal of up to 16,000 tons per day of waste, including up to 14,000 tons per day by rail and up to 2,000 tons per day by truck. The landfill operating conditions would be similar to the Proposed Action.

Activities associated with the Townsite would remain the same as the Proposed Action. The land exchange would occur, and the rights-of-way would be issued.

3.4 Alternate Road Access. Under this alternative, transfer trucks would use the existing Kaiser Road to bring waste to the site, instead of the existing Eagle Mountain Road and its proposed extension. All other features of the Project would remain the same as the Proposed Action. The land exchange would occur, and the railroad right-of-way (but not the rights-of-way for Eagle Mountain Road, as extended) would be issued. This alternative would result in an additional 7.5 miles round trip for each truck.

3.5 Rail Access Only. This alternative would eliminate the use of all non-local area refuse-hauling trucks to the landfill site, resulting in the reduction of capacity of the landfill to 18,000 tons per day. This alternative would preclude transporting waste by truck from the Coachella Valley area of Riverside County. All other features of the Project would remain the same as the Proposed Action. The land exchange would occur, and the rights-of-way would be issued.

3.6 Landfill on Kaiser Land Only. This alternative would allow for the operation of the landfill without implementing the land exchange between the BLM and Kaiser; the land exchange would be modified to include only the United States' interest in the PL 790 patented lands. The rights-of-way would still be issued. The landfill would consist only of Kaiser-owned lands within and around the

East Pit. The landfill footprint would cover an area of approximately 289 acres and would accept a maximum of 10,000 tons per day of municipal solid waste. A lower rail yard east of the landfill would not be built. Landfill design, development, operation, environmental monitoring and closure and postclosure would be as described for the Proposed Action. This alternative would result in the BLM maintaining title to the previously mined lands and Kaiser transferring only a small portion of its open space lands to BLM.

Under this alternative, Kaiser would need to release its Sunrise mining claim over a 20-acre inholding located within Section 36 of Township 3S, Range 14E, which would allow the transfer of the property to the State of California. Kaiser would then acquire the parcel from the State or secure a lease or permit from the State to use the property.

3.7 Landfill Development/No Townsite Development. Under this alternative the landfill portion of the Project would proceed as proposed, but the renovation of existing structures and repopulation of the Townsite would not occur. It is assumed that under this alternative employees working at the landfill and other facilities would commute to the site from Desert Center, Blythe and other communities. The Townsite would remain essentially unchanged from the existing condition, but the landfill would be developed. The land exchange would occur, and the rights-of-way would be issued.

3.8 Alternatives Considered But Eliminated From Detailed Analysis. Some potential alternatives to the Proposed Action were considered and discussed in the EIS/EIR but eliminated from a detailed analysis. The following alternatives were rejected as not being feasible because they did not meet the basic objectives, purpose and need of the Project.

3.8.1 Landfill on Other Kaiser Properties. These potential alternative site locations were eliminated from detailed analysis in the EIS/EIR because (a) the Black Eagle Pit (North) is closer to the ridge line and the boundary of Joshua Tree National Park ("JTNP"), increasing the potential for the landfill to be visible from within JTNP; (b) the location of the Black Eagle Pit (South) more than four miles west of the existing and planned landfill site infrastructure would result in cost inefficiencies and increased air emissions from the transport of waste to the landfill from the onsite rail yards and truck marshalling yards; (c) the Central Pit is more distant from the proposed rail yard than the Project, and is at a substantially higher elevation, making the site operation economically infeasible for the applicant. The Black Eagle Pit and the Central Pit overlie the upper reaches of the Pinto Basin aquifer which flows towards JTNP.

3.8.2 Waste Diversion. This potential alternative, which generally consists of recycling, municipal solid waste composting and source reduction, is not a feasible alternative to the Project. Notwithstanding the efforts of municipalities to implement source reduction and recycling programs,

there are a large number of known and unknown factors which have adversely affected such programs, including highly volatile markets for recyclables, shipping and transportation costs, facility and program costs associated with diversion programs such as composting, and economies of new recycling and disposal technologies. These external costs associated with waste diversion make this alternative infeasible, since recycling and source reduction in excess of the AB 939 mandates will not eliminate the need for disposal capacity. The Proposed Action was analyzed in the EIS/EIR assuming full compliance with the waste diversion mandates of the State of California's AB 939, and the EIS/EIR fully analyzed the short-term, medium-term and long-term capacity needs of the Southern California region assuming municipalities' compliance with AB 939 mandates. The EIS/EIR concluded that two or three regional landfills comparable in size to the proposed Project could be needed over the long term.

3.8.3 Off-Site Landfill Locations. The potential alternatives of proposed off-site landfill locations were rejected as not feasible alternatives to the Proposed Action, because they do not meet several important and basic objectives of the Project, including reclamation of Kaiser's abandoned iron ore mine, federal acquisition and consolidation environmentally sensitive lands, and the development of an economically beneficial Class III nonhazardous municipal solid waste landfill disposal site in the County of Riverside.

Proposed regional landfills at other locations outside of Riverside County would, if successful, help

in some measure to address the Southern California region's long-term waste disposal needs, but they would not accomplish the reclamation of the Kaiser mine site. Moreover, simply because other proposed landfill Projects, including the conditionally approved Rail-Cycle Project in San Bernardino County and the approved Mesquite Landfill in Imperial County, would be considered as potential business competitors does not accord those Projects status as "alternatives" under NEPA.

Further, the EIS/EIR fully discusses the lone-term need for waste disposal capacity in the Southern California region, and the need for more than one regional landfill to provide this long-term capacity. Given the medium and long-term capacity shortfall Projected for Southern California, the EIS/EIR concludes that two or three regional landfills could be necessary to provide disposal capacity over the long term. These sites are not mutually exclusive, and for this reason the EIS/EIR properly examines these sites in the context of their potential cumulative impacts. Accordingly, the EIS/EIR discusses the full range of anticipated and potential impacts from the Project, individually as well as cumulatively with other landfill Projects, as required by NEPA.

With respect to other landfill sites located outside of the State of California, these sites were properly eliminated from detailed consideration given (a) the uncertainty of whether these sites have adequate capacity to address the Southern California regional solid waste disposal capacity needs, (b) the potential for disposal fees associated with these sites to significantly increase, (c) the potential for revisions to

existing laws and regulations that could adversely affect the accessibility of these sites, (d) political and social opposition to disposal of waste at out-of-state locations which are not governed by California's environmental review process, and (e) the County of Riverside's lack of control over these sites.

3.8.4 Landfill Mining. Landfill "mining," which consists of excavating previously disposed of materials from landfills, reclaiming landfill cover and potentially valuable materials in the fill, and thereafter landfilling the remainder is not a feasible alternative to the Project. As discussed in the EIS/EIR, landfill mining is not a practicable option for providing long-term regional landfill disposal capacity due to (a) health concerns due to excavation of wastes, including air quality impacts, (b) limited application of landfill mining technology to certain waste types, (c) the case by case need to document known costs of landfill mining, and (d) the associated regulatory approval process which is costly and time consuming. The EIS/EIR concludes that the potential landfill disposal capacity which could be created by landfill mining a few sites within the County would not provide a sufficient amount of disposal capacity for the anticipated shortfall in capacity for the Southern California region. Further, this alternative would not address one of the objectives of the Project, the reclamation of the former Kaiser mine site.

3.8.5 Alternative Townsite Locations. The EIS/EIR determined that relocation or redevelopment of a new Townsite at a different location would itself generate significant new environmental effects, due to the use of energy resources and the creation of air.

water, traffic and other impacts of construction of a new Townsite.

3.8.6 Alternative Townsite Land Use and Densities. The EIS/EIR determined that altering land uses and densities within the Townsite would result in the potential for increased environmental impacts, including traffic and the destruction of existing homes and home sites. Setting aside more land for manufacturing or industrial uses would provide more jobs, but would require a reduction in Townsite open space and residential areas.

4.0 MANAGEMENT CONSIDERATIONS.

Based upon a careful examination of the EIS/EIR, Federal comment, and after consultation with the NPS/JTNP, Biological Resources Division U.S. Geological Survey, the County of Riverside, and other appropriate Federal, State agencies, and local government agencies, I have concluded that the proposed action is consistent with BLM management goals and complies with FLPMA. Development of a landfill at a previously disturbed site and adoption of mitigation measures ensures that all reasonable means to avoid or reduce environmental harm have been incorporated into the Project. It is my determination that the acquisition of non-Federal land exceeds the values of Federal lands and interest to be conveyed. I also find that the use of the conveyed lands subject to mitigation and monitoring described in the EIS/EIR will not significantly conflict with established management objectives on adjacent Federal lands and nearby Federal lands.

The following factors were considered in arriving at my decision:

4.1 Conformance with California Desert District Land Use Plan: I have reviewed all of the relevant documents and concluded that the proposed land exchange and issuance of right-of-way grants for the Eagle Mountain Project conform with the *California Desert Conservation Area (CDCA) Plan* of 1980, as amended. The Project area is designated Class M and Class I. The current guidelines, pursuant to Amendment 4 of the 1985 Amendments to the CDCA Plan state that in Multiple-Use Class M (moderate use) and Multiple-Use Class I (intensive use): "Federal lands managed by BLM may not be used for waste disposal (either hazardous or non-hazardous). Locations suitable for waste disposal, when found on BLM managed Federal lands, will be transferred to other ownership through sale or exchange." The proposed landfill site has been evaluated for its suitability as a waste disposal site. The analysis identified Federal lands suitable for the Project. In accordance with the CDCA Plan, these lands can be transferred out of Federal ownership for use as a solid waste landfill.

The adjacent Federal lands are managed by the BLM under the CDCA plan and are designated as Class M to the south and east and Class I to the north of the Project. The Project does not conflict with current uses or uses allowed by the CDCA plan for the adjacent Federal lands.

4.2 Acquisition of Important Wildlife Habitat: The proposed land exchange presents an

opportunity for BLM to achieve better management of Federal lands by allowing BLM to consolidate Federal ownership of land that contains habitat for listed species. In the land exchange, BLM would acquire approximately 2,846 acres of Kaiser lands, which contain important habitat for the desert tortoise, a Federally listed threatened species, and for the desert pupfish, a Federally listed endangered species, and for other environmentally sensitive species. In addition to the lands acquired as part of the land exchange, BLM also would acquire approximately 400 acres of desert tortoise habitat for mitigation of impacts caused by the Project. This land would be purchased by the applicant, and then would be conveyed in fee to BLM as mitigation for the loss of 160 acres of tortoise habitat, which would be used for widening and extending the Eagle Mountain Road as part of the Proposed Action. Given the lands to be acquired, including the mitigation land, the land exchange would further BLM's objective of securing additional protection of important habitat for sensitive species.

The Kaiser lands to be acquired by BLM in the land exchange are located in four geographic areas (see Exhibit "B"). The location of these lands, and the environmental benefits associated with their acquisition, are summarized as follows:

Group A: Salt Creek (Dos Palmas) ACEC

T. 8 S., R. II E.

Section 13: NE1/4
Section 21: E1/2E1/2SE1/4
Section 23: Described in metes and bounds.

These three parcels are located in the vicinity of the Salt Creek (Dos Palmas) Area of Critical Environmental Concern (ACEC). The entire ACEC area of about 14,000 acres includes both Federal and private lands and is popularly referred to as Salt Creek (Dos Palmas) ACEC, even though the ACEC only includes the Federal lands. One of the management objectives in the Salt Creek (Dos Palmas) area is to acquire private lands for the management of various palm oases and seeps that provide habitat for the desert pupfish and Yuma clapper rail, both Federally listed endangered species. Over 3,200 acres have been acquired or are in the process of being acquired by BLM. All three of Kaiser's parcels will contribute to consolidating Federal lands, thus enhancing management of the area. The parcel in Section 23 contains desert pupfish habitat along a tributary to Salt Creek.

Group B: Orocopia Mountains Wilderness

T. 7 S., R. 12 E.

Section 35: Described by metes and bounds

Section 36: N1/2SW1/4, SE1/4NW1/4, S1/2NE1/4

T. 7 S., R. 13 E.

Section 31: Described by metes and bounds

These three parcels are located on the southern boundary of the Orocopia Mountains Wilderness Area. They are not contiguous to the Wilderness Area. However, consolidation of Federal lands in this area would simplify land management and enhance recreational opportunities. These parcels are in an

area designated by the USFWS as critical habitat for the desert tortoise under the Endangered Species Act. A population of approximately 50 Nelson's bighorn sheep occurs in this area and another population of approximately 100-200 sheep occurs in the Chocolate Mountains to the south. These populations migrate between the mountain ranges in the vicinity of the parcels. Nelson's bighorn sheep is a State of California fully protected species and a BLM sensitive species. Populations of Orocopia Sage, a Federal species of concern, occur on all three parcels. Acquisition of Kaiser's parcels would block up a large area of BLM managed lands and enhance management of lands used by migrating bighorn sheep.

Group C: Chuckwalla Bench ACEC

T. 6 S., R. 14 E.
Section 16: W1/2WI/2
Section 21: Wl/2
T. 7 S., R 14 E.
Section 5: All

These three parcels are located in the Chuckwalla Bench ACEC. These parcels are in an area designated by the U.S. Fish and Wildlife Service as critical habitat for the desert tortoise under the Endangered Species Act. One of the management objectives of this ACEC is to acquire all private lands within the boundary of the ACEC primarily for management of desert tortoise habitat. This area supports one of the four major populations of the desert tortoise in California. The parcels contain Category I tortoise habitat with a density of 20-50 individuals per square mile. Many signs of tortoises

were observed when transects were run for the biological assessment prepared for the landfill. Thus far, over 32,000 acres of private land inside the Chuckwalla Bench acquisition area have been acquired. Acquisition of Kaiser's parcels in this area would contribute to consolidating Federal lands, thereby enhancing management of important desert tortoise habitat. The BLM has also placed a high priority on acquiring easements and land along Summit Road which crosses Kaiser's properties in order to provide Federal access to the historic Bradshaw Trail.

Group D: Chuckwalla Valley
T. 5 .S., R. 14 E.
Section 27: N1/2, N1/2S1/2

This parcel is located just north of Interstate 10 in the Chuckwalla Valley. Although this parcel is not inside any specially designated management area, it is in an area designated by the U.S. Fish and Wildlife Service as critical habitat for the desert tortoise under the Endangered Species Act and is adjacent to a large block of BLM managed lands to the north. Tortoise densities are estimated to be 20-50 individuals per square. Many signs of tortoises were observed on this parcel when transects were run for the biological assessment prepared for the landfill. Acquisition of this parcel would contribute to BLM's management goals of consolidating ownership of Federal lands and habitat for sensitive species.

4.3 Consistency with State and Local Programs, Plans and Policies. BLM is required under Title II of FLPMA, to the extent consistent

with the laws governing the administration of the Federal lands, to coordinate management activities with the land use planning and management programs of other Federal departments and State and local governments within which the lands are located. Under the land exchange regulations, BLM is required to give full consideration to the opportunity to meet the needs of State and local residents and their economies.

Notification to State Lands Commission Pursuant to Section 707 of the California Desert Protection Act: Under Section 707(c) of the California Desert Protection Act (CDPA), no federal agency may dispose of any Federal lands (or interest in lands) within the State of California without first providing notice to the California State Lands Commission ("SLC") of the availability of those lands. The BLM and SLC have entered into an agreement pursuant to the provisions of the California Desert Protection Act whereby BLM lands with pending actions would not be accepted by the SLC, including BLM lands that were the subject of applications submitted prior to November 1, 1994. BLM re-notified the SLC of the proposed exchange, and the SLC confirmed that it has no interest and will not seek an exchange of these Federal lands under Section 707 of the CDPA.

County of Riverside Approval of Proposed Action. The County of Riverside determined that the Eagle Mountain Landfill Project would fulfill regional and local needs and would provide benefits to the County in their approval of the Project (Resolution

No. 97-236). The major needs fulfilled and benefits provided by the Project are summarized below:

Providing Landfill Capacity for Seven-County Region. The waste disposal capacity of the seven major counties in Southern California was analyzed in the EIS/EIR. The California Integrated Waste Management Board (CIWMB) concluded that if all cities and unincorporated County areas in Southern California comply with the 50 percent waste diversion requirement, six counties in Southern California, including Riverside, Los Angeles, San Bernardino, San Diego, Ventura and Santa Barbara, will still have fewer than 15 years of existing permitted disposal capacity. State law (AB 939) mandates that counties have 15 years of existing permitted disposal capacity. Also, several landfills in the region have closed during the past nine months, and other sites for potential new landfills have been eliminated from consideration. While certain landfills have received approval for expansion during this time period, the net loss in daily permitted disposal capacity was approximately 20,700 tons per day.

Providing Landfill Capacity for Riverside County. With respect to Riverside County, short-term disposal needs could occur as early as the year 2002 for the eastern portion of the County, particularly in the Coachella Valley. With respect to the County's medium-term disposal needs, the entire County may experience a shortfall by the year 2008 or sooner because of the limits on the daily permitted capacity of different landfills. The landfill would serve as a component of the County's regional integrated waste management system and is expected to accommodate

a substantial portion of the County's waste disposal needs for the long term.

Furthering State-Wide Waste Diversion Requirements and Compliance with AB 939. The Project will further the State's directive to all counties to increase levels of waste diversion pursuant to the requirements of Assembly Bill 939, the California Integrated Waste Management Act (AB 939). This state law requires that local jurisdictions achieve waste diversion goals — recycling 25% of the solid waste stream by 1995, and 50% by 2000. In furtherance of this requirement, waste will be accepted at the Eagle Mountain landfill only if it has been processed in accordance with the requirements of AB 939. The recovery of recyclable materials will assist the counties using the Project to meet the source reduction goals of the AB 939. The County also determined that the Project will assist the County in complying with AB 939, which requires the County to provide adequate solid waste disposal capacity for both its present and reasonably anticipated needs.

Providing Waste Disposal Facility that Meets or Exceeds all State and Federal Requirements. The Project will be the only landfill in Riverside County which meets current groundwater protection and other current state and Federal environmental protection requirements, thus providing sufficient waste disposal capacity to enable the County to close existing landfills that do not meet current state and Federal Regulations.

Increasing County Revenue and Employment. Based on economic reports prepared by experts, the Proipgt is Projected to generate $210 to $280 million in revenue to the County in the first twenty years of operation. That additional revenue can be used to provide needed Federal services to the residents of Riverside County. The Project will also support or save, on an annual basis, an average of 1,354 jobs in the County during the first 20 years. The overall economc impact during the next 20 years to the County is Projected to be in excess of $3 billion.

Revitalizing Eagle Mountain Townsite. Presently, the Eagle Mountain Townsite is largely vacant, underutilized and in disrepair in some areas. The Project calls for the revitalization and repopulation of the Townsite, which would make use of the existing infrastructure and houses. Thus, the Project will bring social and economic benefits to the area.

I have determined that the needs fulfilled and the benefits provided by the landfill as defined by the County and analyzed in the Final EIS/EIR do not conflict with any Federal laws or regulations and that there are no overriding Federal considerations which warrant denial of the land and exchange or issuance of right-of-way grants for the landfill.

4.4 **Impacts to Minerals:** Sand and gravel located on the eastern selected properties, valuable as construction aggregate, was identified by P. K. Morton in the *Mineral Potential Report*. The Morton report was reviewed and amended by the BLM California Desert District to reflect a market analysis of the mineral potential. Although a current market

for sand and gravel does not exist, demands will be placed on deposits in areas where previous development and a mining infrastructure exists, making the property "prospectively valuable." Therefore, the BLM has determined that a reservation is applicable ensuring that the United States receive a fair market value for any construction aggregates severed, removed and sold for commercial purposes from the property. Market demand for a desert source for mineral materials is increasing due to limited access and availability in the Los Angeles Basin. Areas within the desert bio-regions of southern California are currently undergoing land use planning decisions for the protection of the desert tortoise, which will put large areas of alluvial material off-limits to sand and gravel development. It is important that the BLM assures mineral materials are available to meet local, regional, and State needs.

The affected ore deposits on the Project site represent less than one percent of the economically recoverable iron ore reserves in the United States. However, since it has been determined that the landfill operation could render portions of these existing iron ore reserves un-minable, landfill operations will be phased to assure that the iron ore most feasible to mine are impacted last to allow for recovery, if ore recovery becomes economically feasible.

The Morton report concluded overall that the Federal lands were judged to have low potential for iron and gold mineral resources. Morton examined the Federal lands and found that a few gold veins of

the Black Eagle Mine type are scattered throughout the property. Analysis of samples taken and the opinion of Morton was that these veins did not contain sufficient ore to be considered valuable. Kaiser also examined the property for gold during the late 1960's and concluded that there was not sufficient mineralization to warrant economic development.

The Federal lands are not currently classified by the BLM as being valuable, prospectively or otherwise, for leasable minerals or Geothermal Steam Act minerals.

Kaiser indicated in a memorandum that the subject non-Federal parcels are without value. The BLM examined the non-Federal parcels and completed a mineral evaluation of the non-Federal lands as required by BLM policy. The BLM concluded that the non-Federal lands did not contain minerals of economic value that could be developed under the United States mining and mineral leasing laws. As such, the probability that future development of mineral resources on the non-Federal parcels interfering with the purpose and intent of acquiring the parcels is low.

4.5 Impacts to Joshua Tree National Park: An important concern to the BLM, the National Park Service (NPS), the Federal and the Joshua Tree National Park (JTNP), a cooperating agency, is the proximity of the Project to JTNP. The Project is about 1.5 miles from JTNP at its closest point and about 3 miles from wilderness area within JTNP. JTNP is a Class I air quality unit under the

Clean Air Act and a designated World Biosphere Reserve. It was designated as a National Park and its boundaries extended by the California Desert Protection Act (CDPA) of 1994. The CDPA legislative history indicates that Congress was cognizant of a proposed solid waste landfill in proximity to JTNP and wilderness.

The EIS/EIR reviewed the NPS guidance and policies for all National Parks (*Natural Resources Management Guidelines*. NPS-77, 1991) as well as JTNP's *General Management Plan and Final EIS* (1995) and *Natural Resources Management Plan* (1993). JTNP is developing a wilderness and backcountry management plan which includes the newly incorporated lands. These documents provide operating policies and set management objectives for JTNP. In cooperation with JTNP, the EIS/EIR addressed issues that potentially affect the National Park and its uses. The principle issues were: windblown debris, visibility, nighttime lighting, odor, noise, visual, groundwater resources, biological resource (see Sections 4.6. 4.7. 4.8), and wilderness.

To prevent windblown litter from affecting JTNP as well as adjacent lands, mitigating measures such as portable litter fences, litter patrol and minimize exposure of landfill face were developed. Odor and noise (vehicles, trains, landfill operations and construction) were analyzed, and impacts were indiscernible. Nighttime lighting including gas flare (part of gas collecting system) was analyzed in the EIS/EIR for impact to nighttime character and to sky glow. With the use of downward directed lighting and use of shields to cut off upward radiation and cut-off

type of lighting, there will be no change in existing nighttime character and no impact from sky glow. Regarding visual impacts , the Project area is already disturbed from prior mining operations, existing utility infrastructure, townsite structures and a prison. While for hikers and backpackers the Project could be visible from the boundary, it would not change the existing contrast and disturbance. For Park users at more distant Park facilities (40 miles), they would not be effected.

Analyzing the impact that the Project will have on an individual's wilderness experience, the EIS/EIR states that the Project can have an adverse impact on an individual's wilderness experience. The wilderness experience is a subjective experience which is unique to an individual's interaction with wilderness. For some individuals that cannot be mitigated.

JTNP expressed concern about the relationship between springs in JTNP and the Project area's aquifer. Based on hydrogeologic analysis, there is no association between the two, and no impact will result.

Of concern to NPS was potential visibility impact from plumes from the project to park visitors. In consultation with NPS and using an EPA approved model, the EIS/EIR modeled the visibility of all project emissions. The EIS/EIR states that the visibility impact is "not significant" based on the limited number of hours (39 hours) when impacts may occur, the time of day and year when impacts may occur, and based on impacts occurring in areas receiving very little Park use. As described in the

EIS/EIR, it is the NPS's position, as Federal manager of Class I site, that based on the number of hours, the modeled plumes were a "significant impact" due to the number of hours and location in the Park. Notwithstanding, NPS position as Federal land management of Class 1 area, the Project with mitigation does not exceed the Class I area increments for any pollutant and a Prevention of Significant Deterioration (PSD) review is not required.

Given the mitigation and monitoring provisions as well as the analysis of impacts, I have determined that all reasonable and practicable means have been taken to avoid or reduce adverse impacts from the Project on adjacent JTNP. It is further my determination that the exchange and the subsequent project with mitigation will not significantly conflict with the management objectives in guidances and management plan for the nearby JTNP.

4.6 Impact to Desert Tortoise and Desert Pupfish: The protection of the desert tortoise and desert pupfish during construction and operation of the Project was a concern for the BLM, U.S. Fish and Wildlife, California department of Fish and Game and members of the Federal.

In compliance with Section 7 of the federal Endangered Species Act, the BLM consulted with the U.S. Fish and Wildlife Service ("USFWS") on the potential impacts of the Project on the desert tortoise (a federally listed threatened species) and the desert pupfish (a federally listed endangered species), and measures to mitigate such impacts. The USFWS

issued its Biological Opinion (September 10, 1992) stating that the Project is not likely to jeopardize the continued existence of the desert tortoise or the desert pupfish, and imposing a range of mitigation measures designed to protect these species. After critical habitat was proposed for the desert tortoise in 1993, the BLM conferred with the USFWS, and the USFWS confirmed its "no jeopardy" opinion (September 20, 1993).

Additional biological surveys were carried out in 1996 in connection with the new EIS/EIR and the USFWS reviewed the updated information and stated that "new survey information of desert tortoise in new areas in the Project vicinity and the recent designation of critical habitat shall be investigated, but at present the Service sees no need to re-initiate consultation pursuant to section 7 of the Act." The USFWS's Section 7 Biological Opinion (9/10/92), Section 7 Conference (9/20/93) and 1996 Memorandum (9/30/96) are included in Exhibits D-1, D-2 and D-3, respectively.

The railroad which has been operating for over 40 years as part of the previous mining operations at the Project site has the potential for killing or injuring tortoises and fragmenting their habitat. The mitigation measures are designed to reduce or eliminate that potential by requiring inspection of the railroad line before each train trip to remove tortoise which might be in harm's way and by enabling the tortoises to pass under the rail line by development of culverts beneath the line and over the line by placement of ballast between the rails. A monitoring program implemented for the life of the

Project will be instituted to determine the effectiveness of the mitigation and to help locate future culverts and ballast locations.

The issue of the landfill attracting ravens to the area and raven predation of tortoise was a major concern of biologists and other interested parties. A raven monitoring program, including a minimum of two years of preparation monitoring, will be developed and enacted in conformance with BLM methodologies. Monitoring of ravens will continue throughout the life of the landfill Project or until the BLM, USFWS, and CDFG determine it is no longer necessary. Examples of mitigation measures include minimum of six inches of soil cover placed over deposited refuses on a daily basis to minimize attracting ravens and other predators to refuse. The perimeter of the active landfill and waste handling areas will be fenced to exclude predators such as coyotes and kit foxes. A nonlethal raven control program will be conducted including hazing at the landfill site, prompt removal of road-killed animals along access roads, and the possible use of bird repellant methyl anthranilate. If necessary, and subject to the approval of the BLM, USFWS and CDFG, a raven control program will be implemented that may include nest destruction, shooting and/or alterations of landfill operations.

The landfill operator will be required to purchase 400 acres of tortoise habitat selected by the BLM, NPS and CDFG, and transfer ownership of the habitat to the BLM, as mitigation for the loss of 160 acres of habitat. All such compensation acreage will be within the Chuckwalla Bench ACEC.

A portion of the railroad serving the Project is located in the vicinity of Salt Creek, the habitat of the desert pupfish, a federally listed endangered species. In addition to other mitigation measures designed to protect the pupfish and its habitat, after 36 months from the commencement of operations, the landfill operator will contribute the sum of $45,000 to the University of California to construct a pool to accommodate a population of Salt Creek pupfish at the Deep Canyon Reserve. This effort will help provide information on this species that could contribute to its conservation. In addition all requirements specified in a stream bed alteration agreement with CDFG relating to desert pupfish must also be implemented. All weed abatement in the area of the pupfish habitat will be done by hand instead of chemically. The roadbed and trestle through the habitat shall also be treated to prevent pollutants from escaping from the roadbed and trestle and possibly polluting the habitat. Prior to each passage of a locomotive engine over the Eagle Mountain Railroad, the fuel and lubricant holding tanks must be inspected; all leaks will be repaired prior to passage over Salt Creek; and a log of all such inspections will be kept and provided to the BLM or the USFWS upon request. CDFG and USFWS must immediately be notified in the event of any accident, and the results of any restoration or restocking efforts must be periodically reported to those agencies.

Implementation of the required mitigation measures will result in the avoidance or substantial reduction of the environmental impacts to desert tortoise and desert pupfish. Details of these

mitigation measures are set forth in Exhibit C (Mitigation and Monitoring Program) and Exhibit D (Biological Opinion, U.S. Fish & Wildlife Service). Given the mitigation measures and monitoring measures, I have determined that all practical measures have been taken to avoid or reduce adverse impacts to the desert tortoise and the desert pupfish.

4.7 Impact to Other Biological Resources: The EIS/EIR identified other important wildlife and plant species that occur on Federal and private land within the Project areas. These species have been observed or detected by sign at the landfill site or along the associated roads and railroad right-of-way. Wildlife species include ringtail, American badger, northern harrier, LeConte's thrasher, yellow warbler, yellow-breasted chat, and black-tailed gnatcatcher. No listed State or Federal plant species were observed within the Project boundaries. The CDFG and several commenters expressed concern about Alverson's Foxtail Cactus, California Barrel Cactus. California Leaf-Nosed Bat and Townsend's Big-Eared Bat, Nelson's bighorn sheep, and mountain lion.

A detailed description of these biological resources is set forth in the Draft EIS/EIR and the Biological Assessment completed in March 1992. Mitigation and monitoring measures have been designed to address concerns for these and other biological resources and include such conditions as the placement of four new, permanent water sources for bighorn sheep, preserving approximately 644 acre buffer zone for bighorn sheep habitat, and opening an existing adit to create a potential alternative winter

roost site for the California leaf-nosed bat. For the Alverson's foxtail cactus, a transplanting experiment indicated 100 percent survival of transplanted cactus and additional mitigation include the collection of seed. Transplanting of California Barrel Cactus will occur as well as the collection of seed. These are examples of a few of the mitigation and monitoring measures which are required for addressing other biological resources potentially affected by the Project.

Given the mitigation and monitoring measures, I have determined that potential impacts to other biological resources have been reduced to an acceptable level.

4.8 Biodiversity and Ecosystem Function. Some commenters, including the NPS/JTNP. expressed concern about the potential impacts of the Project on the desert ecosystem and its biodiversity. The EIS/EIR addresses the potential impacts to biodiversity and ecosystem function associated with the Project, including potential habitat loss, additional nutrients originating directly or indirectly from landfill material (defined as "eutrophication" by NPS), the introduction of exotic species, nitrate deposition and global warming. The mitigation measures identified throughout the EIS/EIR after consultation with the appropriate resource agencies address potential impacts to a broad range of plants and animals that occur in the Project area. Various control measures will be implemented within and around the. landfill and the Townsite. In addition, the funds deposited into and administered by the Environmental Mitigation Trust

will be used for, among other things, the acquisition of habitat and long-term monitoring of the areas and ecosystem surrounding the Project site. Given the mitigation and monitoring measures, I have determined that the potential impacts to biodiversity and ecosystem function after mitigation will be reduced to an acceptable level.

4.9 Impact to Groundwater Quality. Some commenters expressed concern about the potential for leachate (water or other liquid that comes into contact with waste) and landfill gas to contaminate the groundwater. The EIS/EIR analyzed the Project design. The liner system will act as a barrier to prevent the migration of landfill gas. Additionally, an active landfill gas collection and recovery system will be installed within the landfill, and the vadose zone monitoring system will include a gas monitoring system.

I have determined that after implementation of the mitigation and monitoring measures, all practical means have, been taken to avoid or reduce the potential for impact to water quality.

4.10 Impact to Groundwater Use. Several commenters were concern that the Project would result in overdraft of the groundwater. The EIS/EIR evaluated maximum groundwater use by the landfill and the townsite as 1243 ac-ft/yr. The groundwater recharge is estimated to be approximately 12,200 ac-ft/yr. The Project will not result in overdrafting the groundwater.

4.11 Impact of Seismic Activity. The affect of seismic activity on the landfill and liner system was a concern of commenters. The liner system is designed to meet or exceed state and federal seismic design requirements. Although the Project site is east and outside the areas of high historical seismicity in Southern California, the landfill liner system will be designed to withstand shaking from large earthquake events (an earthquake equivalent to an 8.0 quake on the San Andreas fault, which is approximately 32 miles from the Project site). The EIS/EIR evaluated the performance of existing landfills with and without composite liner systems in the California coastal zones that are subject to seismic activity, including impacts from the 1994 Northridge (Los Angeles) earthquake. Based on the Project's liner system, which meets or exceeds state and federal requirements in all respects, the absence of active faulting at or near the landfill and evaluation of landfills with and without liners after seismic events, I have determined that the impact from seismic activity would be minimal.

4.12 Impact to Air Quality. An important concern of the public and the NPS/JTNP was the potential air quality impacts from the Project. A number of potential sources of air quality impacts that could result from the Project were analyzed in the EIS/EIR, including combined emissions from landfill gas flaring; emissions from internal combustion engines in equipment utilized in landfill construction and landfill operation; fugitive dust created from landfill construction and landfill operation; and emissions from tracks and trains during transport of solid waste to the landfill.

The mitigation measures required to be implemented include: compliance with state and federal on- and off-road vehicle emission regulations; preferential use of "clean fuel" as appropriate; preferential use of low- or zero-emission vehicles; active dust suppression; evaluation of the effectiveness of the dust suppression program; selective vehicle/equipment shutdowns; and Best Available Control Technology for landfill gas recovery.

The Project will result in lower emission levels in the South Coast Air Basin at the expense of the desert areas. After implementation of all the mitigation measures, and while the EIS/EIR states that a number of the potential impacts from sources would be below the level of significance, the Project's potential air quality impacts, on the whole, will remain adverse.

Pursuant to Section 176(c) of the Clean Air Act, Federal agencies cannot support, permit or approve any activity which does not conform to an applicable state implementation plan (SIP). The Federal action of a land exchange is not subject to Section 176. The EPA has determined that transfers of ownership, interests, and titles in land, regardless of the form or method of the transfer, are categorically exempt from the conformity requirements (40 C.F.R.§51.853(c)(2)(xiv)). The Federal action of right-of-way authorizations is also exempt, because the direct and indirect emissions associated with the subject rights-of-way are demonstrably below specified de minimis levels.

Given the mitigation measures required for the Proposed Action, I have determined that the project's air quality impacts although adverse have been reduced to an acceptable level.

4.13 Procedural, Legal and Administrative Concerns: There were administrative issues related to the proposed exchange of lands with Kaiser that required further analysis and clarification:

4.13.1 Updated Appraisal. An independent appraisal of the non-Federal and Federal lands was previously performed for the land exchange and approved by the BLM on July 10, 1993. In accordance with the requirements of FLPMA and regulations thereunder, including 43 C.F.R. § 2201.3-4, the BLM has obtained an independent updated appraisal ("Appraisal") of the exchange lands, including the Federal lands, the non-Federal lands, and the interest of the United States in the patented lands conveyed to Kaiser in 195S pursuant to Private Law 790. The Appraisal was reviewed and approved by the BLM's Chief State Appraiser on April 28, 1997. The valuation date of the Appraisal is September 25, 1996, and the Chief State Appraiser has determined, that the appraisal will be valid until market conditions show any significant change.

The Appraisal was prepared by David J. Yerke, Inc. in accordance with the standards set forth in 43 C.F.R. §§ 2201.3-1 through 2201.3-4 and, to the extent appropriate, with the *Uniform Appraisal Standards for Federal Land Acquisitions.* The Appraisal, including the Chief State Appraiser's

written review report, is included in the administrative record.

At the time of the issuance of the Final EIS/EIR, the Appraisal had been submitted to but not yet reviewed and approved by the BLM. The Final EIS/EIR contained a summary of the appraisal report which was submitted to BLM, including a disclosure that the appraisal report was considered preliminary until reviewed and approved by the BLM. The appraisal report, as summarized in the EIS/EIR, was subsequently approved by the BLM.

As stated in the Appraisal, the market search area included over 3,600 square miles of remote mountainous and desert lands within eastern Riverside County, with a sales history of approximately 120 transactions dating back to January, 1993. The sales comparison analysis was narrowed to 16 sales occurring since January, 1995 based on overall compatibility with the subject lands. The Appraisal indicates that market values in the area have declined since 1990 and are currently at substantially lower levels than comparable sales used in the July, 1993 appraisal report.

Federal Lands. The Federal lands consist of approximately 3,481 acres of lands within and around the Project site administered by the BLM, including Federal lands subject to mining and mill site claims held by Kaiser. The fair market value of the Federal lands (excluding the PL 790 patented lands discussed below) was determined to be $268,000, or an average of approximately $77 per acre, using the sales comparison appraisal approach,

and based on the acreage of mountainous lands and level desert lands within the selected Federal lands.

PL 790 Lands and U.S. Interest. The PL 790 patented lands consist of 460.63 acres within and around the townsite area, which were patented by the BLM to Kaiser in 1955 pursuant to PL 790 (commonly referred to as the "Campsite Patent"). Although PL 790 indicates a total acreage of approximately 465 acres for these lands, which is the acreage figure noted in the Draft EIS/EIR, survey records indicate a total acreage of 460.63, which is the figure used by the Appraisal. The Campsite Patent contains a reversionary interest in the United States in the event that the property is not used for a continuous period of 7 years as a camp site, mill site or for other purposes incidental to mining. The interest of the United States in these lands will be conveyed to Kaiser as part of the land exchange.

Accordingly, the United States' interest in these 460.63 acres — but not the fee interest, which Kaiser already owns — must be given a value as part of the appraisal of the Federal lands. Although the nature of the United States' interest is actually less than a full fee interest, the BLM determined that, for purposes of appraising the value of this interest, the appraiser should value the interest as unimproved patented lands in fee (exclusive of improvements), not merely as a reversionary interest. This conservative methodology would favor the United States by increasing the compensation that BLM would receive from Kaiser in exchange for these property rights.

The fair market value of the PL 790 Patented Lands in fee, as raw lands without any Kaiser-owned improvements, was determined to be $49,000, or an average of approximately $106.38 per acre, using the sales comparison appraisal approach, and based on the acreage of mountainous lands and level desert lands within the PL 790 Patented Lands.

Non-Federal (Kaiser) Lands. The non-Federal lands consist of seven noncontiguous parcels owned by Kaiser along the Eagle Mountain Rail Line, comprising a total of approximately 2,846 acres. The fair market value of the non-Federal lands was determined to be $296,900 or an average of $104.32/AC, using the sales comparison appraisal approach and based on the acreage of mountainous lands and level desert lands within the offered non-Federal lands.

Thus, the total appraised value of the Federal lands and the interest of the United States in the PL 790 lands has been determined to be $317,000, and the appraised value of the non-Federal lands has been determined to be $296,900, leaving a difference of $20,100 in favor of the BLM. All reasonable efforts have been made to equalize values by adding or excluding lands; the Federal lands being transferred to Kaiser include all BLM-administered lands, and interests in BLM-administered lands, within and contiguous to the Project site, and the non-Federal lands being transferred by Kaiser to the BLM include all of Kaiser's land holdings within environmentally sensitive areas. Therefore, the BLM has determined that a cash equalization payment from Kaiser to the

BLM in the amount of $20,100 is appropriate, pursuant to 43 C.F.R. § 2201.6.

4.13.2 Status of the PL 790 Patented Lands and Rights-of-Way. Some members of the Federal contended that the reversionary interests included in the PL 790 patent and existing PL 790 railroad right-of-way along Kaiser's Eagle Mountain Railroad have been triggered and, therefore, that Kaiser is currently trespassing on Federal lands. It is BLM's determination that the reversionary interests of the United States have not been triggered, and, further, that Kaiser is not in trespass on Federal lands.

Pursuant to Private Law 790, in 1955 the BLM issued a patent to Kaiser Steel which covered approximately 460.63 acres in and around the Townsite (sometimes referred to as the "Campsite Patent"). The Campsite Patent conveyed this property to Kaiser Steel (and is now held by Kaiser Eagle Mountain, Inc.), subject to reversion to the United States in the event the property is not used for a continuous period of seven years as a camp site or mill site or for other incidental purposes in connection with Kaiser's mining operations. Similarly, the existing right-of-way for Kaiser's railroad (also granted pursuant to PL 790) is subject to a reversion to the United States in the event the right-of-way is abandoned or is not used for a continuous period of seven years.

In view of the fact that Kaiser received full and complete title to the surface estate, subject only to the possibility of the reverter, BLM has determined

that Kaiser's lease of a portion of the patented property for the operation of a return-to-custody facility is within the rights granted to Kaiser under the patent. The facility has been operating at Eagle Mountain since 1986 under a lease agreement from Kaiser and a County Federal use permit. Kaiser received full possessory interest in the surface of the property and had the right to utilize that surface according to its discretion subject only to the conditions of the reverter clause and the planning and zoning rules and regulations of the local jurisdiction, which is the County of Riverside.

The reversionary interest of the United States in the approximately 461 acres patented to Kaiser in 1955 under PL 790 is discussed in the Draft EIS/EIR ("Reversionary Interest in Townsite Area and Rights-of-Way") and in a Department of Interior Regional Solicitor's Opinion contained in Appendix O. As stated in the Opinion, "The surface estate will not revert to the United States automatically, but would only revert upon the election of the Secretary [of Interior], based upon a finding that the facts support the applicability of the reversionary clause...." The BLM has determined that the reversionary interest under PL 790 has not been triggered. Furthermore, as noted in the Regional Solicitor's Opinion, control of the reversion rests with Kaiser because Kaiser can prevent the reversion by using the property for mining-related purposes. Thus, if the Project does not go forward, the campsite and the railroad right-of-way (i.e., the lands on which the United States retains a reversionary interest) could remain in Kaiser's ownership. As a result, these lands would

not necessarily revert to the United States if the Project does not go forward.

Although Kaiser has ceased full-time mining operations at the Kaiser Mine, Kaiser has continued to make shipments of ore and other materials (e.g., aggregate and riprap) and has engaged in other activities incidental to mining at the site, such as the maintenance of equipment and roads, sand and gravel sales, administration and annual assessment work in connection with the maintenance of Kaiser's mining claims and other mining-relating activities. A shipment of iron ore was made over the railroad in March of 1993. The BLM has determined that the existing right-of- way has not reverted, and that the new FLPMA rights-of-way should be granted regardless of the status of the existing right-of-way.

The BLM has the authority to transfer the United States' interest in the PL 790 lands to Kaiser under FLPMA. The BLM's interest in the PL 790 lands is an "interest" in lands under 43 C.F.R. § 2200.0-5(i) and, therefore, the BLM has authority to dispose of its interest as part of the land exchange with Kaiser.

4.13.3 Eagle Crest Energy Company Hydroelectric Facility Proposal. On January 31, 1991, the Eagle Mountain Energy Company (now Eagle Crest Energy Company, or "ECEC") filed an application for a preliminary permit for a pumped storage hydroelectric Project at the Eagle Mountain mine site with the Federal Energy Regulatory Commission ("FERC"). ECEC and the FERC took the position that the Federal lands included within their

Project were automatically reserved under the Federal Power Act from disposition, effective upon the filing of their application with the FERC. On March 22, 1995, the FERC vacated the Section 24 reservation on all Federal lands other than those within ECEC's license application boundaries.

In February 1996, Kaiser filed with the BLM an Application for No Injury Determination pursuant to 16 U.S.C. § 818 (Section 24 of the Federal Power Act) and 18 C.F.R. § 25.1, relating to the BLM-administered parcels that are both within the boundaries of ECEC's proposed hydropower facility and within the boundaries of the proposed Project and land exchange (FERC-reserved BLM parcels). Section 24 of the FPA authorizes the BLM to conditionally transfer any BLM- administered lands which have been reserved by the FERC for power purposes, provided that the FERC determines that the value of such lands as power sites will not be injured or destroyed for future power development by such conditional transfer. The condition on the transfer would be in the form of a reservation in the transferring patent reserving the rights of the United States and its licensees for power purposes.

On April 30, 1996, the BLM submitted to the FERC a formal request for No Injury Determination Under Federal Power Act Section 24. On June 7, 1996, FERC granted the BLM's request, stating that the power value of the affected Federal lands would not be injured or destroyed for purposes of power development if conveyed to the Kaiser by BLM. Accordingly, the patent to these lands will contain a reservation for power purposes under Section 24 of

the Federal Power Act if required by the FERC at the time of the consummation of the land exchange.

4.14 Concerns Regarding Hazardous Materials: Federal concern was expressed about the possibility of hazardous materials being transported to the landfill site or the potential for the prior existence of hazardous material occurring on either the Federal or non-Federal lands due to past activities.

The Project provides for only the development of a Class III nonhazardous solid waste landfill, and waste delivered to the landfill site will only be accepted from solid waste facilities serving jurisdictions in compliance with Assembly Bill 939, the California Integrated Solid Waste Management Act of 1989, as well as any successive implementing legislation and any applicable Federal or State waste diversion legislation. Class I hazardous wastes will be diverted from the waste stream to disposal areas designed to accept them, all of which are presently located outside of Riverside County. In addition, certain liquid wastes, white goods (e.g., appliances), sewage and water treatment sludge, incinerator ash, infectious wastes, and radioactive wastes will be diverted from the waste stream and sent to disposal areas designed and approved to accept them.

Regarding the potential for the prior existence of hazardous material occurring on the lands to be exchanged, in 1992 a contaminant survey of the Federal land and the non-Federal land was conducted in accordance with Section 120(h) of the Comprehensive Environmental Recovery and

Liability Act (CERCLA). In 1996, BLM conducted three additional Level I surveys on the non-Federal lands, the Federal lands and the PL 790 Townsite area lands, respectively. There was no evidence or recorded information found to indicate that any hazardous substance was stored, disposed of, or released on any of these lands.

In 1994, the California Department of Toxic Substances Control ("DTSC") conducted an inspection of the Project site in response to certain citizen allegations. The DTSC's Complaint Inspection and Sampling Report stated that no evidence was found to support the allegations that hazardous waste was disposed at the Project site in sufficient quantities or with toxic characteristics so as to noticeably impact the environment or to warrant a formal enforcement action. Subsequently, in 1994 the DTSC issued an Addendum Report reaffirming the conclusions of the earlier Report.

The U.S. Environmental Protection Agency ("EPA") issued its own report in 1994, after undertaking a Federal Facility Preliminary Assessment review of the site under CERCLA to determine whether the site should be placed on the EPA's National Priorities List ("NPL"). EPA stated that the Preliminary Assessment requirements had been met for the site, and no further action by EPA was warranted at that time.

To the best of our knowledge, no hazardous materials were used in conjunction with iron ore recovery at the mine on the Federal lands. Hazardous materials may occur on the Federal lands. If any time

after the conveyance of the selected lands, any condition on the land is found to be in violation of any Federal, State or local laws or regulations. Kaiser or its successors shall be responsible to immediately take all actions necessary to abate any such violation, and perform all activities required to remediate the site consistent with all applicable laws and regulations, irrespective of whether or not Kaiser or its successors caused, contributed to, or had actual knowledge of the activities or conditions causing the violations. Further, Kaiser and its successors will hold the United States harmless from any liability and expense resulting from such condition or activities.

4.15 Irreversible and Irretrievable Commitments of Resources. With respect to this Project, there are irreversible and irretrievable commitments of resources that must be acknowledged. The size and life of the Project represents a large commitment. Over 2,000 acres will be directly affected by the Project. Nearby lands owned by Kaiser or in proximity to the Eagle Mountain community will be indirectly affected. The potential lifetime for the landfill is 100 ears which is beyond the scope of an average Federal works Project. After formal closure of the landfill, maintenance and monitoring and post-closure activities will continue.

The most significant irreversible impact, as in other land development Projects, relates to the land on which the Project is actually located. The land in question for the Eagle Mountain Landfill, however, has already been subject to very severe disturbance

from over 40 years of mining activities. The irreversible change in the land has already taken place, and the Project involves a beneficial use and ultimate restoration of the disturbed land. The development of a landfill at a previously disturbed site, such as Eagle Mountain, avoids significant adverse impacts of locating a landfill in an area not previously disturbed.

It is my determination that the irreversible and irretrievable commitment of resources associated with the Eagle Mountain Landfill Project is not sufficient to warrant disapproval of the land exchange or rights-of-way or the selection another alternative.

4.16 Cumulative Impacts. Cumulative impacts depend on the future uses of the area, such as possible increased agricultural activity, JTNP Projects and improvements, other regional landfills in the Southern California region, or the construction of Eagle Crest Energy Company's ("ECEC's") proposed hydroelectric Project (see Section 4.13.3 above). There are no other known proposed Projects within 30 miles of the Project site. The EIS/EIR determined that increased air emissions in both the South Coast Air Basin and the Southeast Desert Air Basin would be the most significant cumulative effect resulting from the proposed Project and other Projects of a regional nature. In addition, the EIS/EIR determined that increased regional water consumption from either an increase of agricultural activity to historically high levels and/or development of the ECEC proposal to operate a pumped storage

hydroelectric Project would be a significant cumulative impact.

The EIS/EIR concluded that the potential cumulative impacts that would be considered significant after mitigation are air quality (because the Project is located within an existing nonattainment basin) and groundwater use.

4.17 Environmental Justice. President Clinton signed Executive Order 12898 on February 11, 1994 to address environmental justice in federal programs, policies, and activities. Secretary Babbitt issued an environmental justice policy for the Department of the Interior on August 17, 1994, in support of Executive Order 12898. Environmental justice means the prevention of disproportionately high and adverse human health or environmental impacts on minority or low- income populations.

The land exchange and right-of-way grants are consistent with Executive Order 12898 and the Department of the Interior's policy on environmental justice. No disproportionate adverse impacts on human health are expected for minority or low-income populations.

4.18 Native American Consultation. The chairpersons from Fort Mojave Indian Reservation, Chemehuevi Indian Reservation, Colorado River Indian Reservation, Twentynine Palms Indian Reservation, Morongo Indian Reservation, Aqua Caliente Indian Reservation, Cabazon Indian Reservation and Torres-Martinez Indian Reservation were contacted in January, 1990. It was determined

that Morongo Indian Reservation, Aqua Caliente Indian Reservation and Cabazon Indian Reservation, Fort Mojave Indian Reservation and Chemehuevi Indian Reservation did not wish to visit the area or make any statement with respect to the Project. At the February site visit, two Mojaves from the Colorado River Indian Tribes and a Cahuilla elder from Torres Martinez Indian Reservation were present. Their concern focused on possibility of inadvertent dumping of hazardous materials.

5.0 MITIGATION AND MONITORING. It is my determination that all practicable means to avoid or reduce environmental harm have been adopted. A comprehensive Mitigation Monitoring and Reporting Program has been adopted for the Project and is included herein as Exhibit "C." As part of the overall mitigation and monitoring program, the special measures have been incorporated and described below:

5.1 Environmental Mitigation Trust. This measure, which was not related to the Federal action but referenced in the FWS Biological Opinion, assists the desert communities of eastern Riverside County in meeting the biodiversity challenge by providing an additional source of funding for acquisition of sensitive plant and animal habitat and open space and for conducting long-term monitoring and other environmental research activities. Specifically, it provides for an Environmental Mitigation Trust to administer the contribution of $1.00 per ton of waste deposited at the landfill. The Environmental Mitigation Trust, administered by the Riverside County Board of Supervisors, will acquire, restore,

maintain and preserve open space lands, interests in lands, water or water rights, wildlife habitats, and provide public access to such lands. The Trust will also support research and education concerning conservation of natural resources and monitor the long term effects of the Project on the desert ecosystem. Of the funds deposited into the Trust, 72% of the funds will be used primarily to acquire lands that provide high quality habitat for special status species in the region. In addition, 18% of the funds will be used for long-term monitoring, research and mitigation. The remaining 10% of the funds will be used to acquire privately held parcels located in JTNP and for long term research, monitoring and mitigation associated with potential unforeseen future impacts of the Project to JTNP.

5.2 Citizens Oversight Committee. A Citizens Oversight Committee will be established by the County to oversee implementation of the landfill. The Committee is designed to function as a "watchdog" to provide an added safety check regarding conditions imposed on the Project. Meetings will be scheduled as needed to review status reports, technical data and reports on the landfill issued by all agencies having regulatory authority over the Project. Although the BLM would not be directly involved as a member of the Citizens Oversight Committee, it is reasonably foreseen that the BLM will be concerned with pertinent issues, reports or data involving Federal land management in the area of the Project. The Citizens Oversight Committee will prepare an annual report summarizing its findings and will make inquiries or

file such reports with other regulatory agencies as it deems appropriate.

5.3 NPS and Kaiser/MRC Agreement. NPS and Kaiser/MRC signed an agreement (December 12, 1996) whose purpose is to assure NPS that the Project will consider the purpose and values of the Park and not result in derogation of the value and purposes of the Park; it was an independently initiated between NPS and Kaiser/MRC. It was not required by the BLM nor a part of the Federal action. According to the agreement it "provides for additional obligations and responsibilities of Kaiser/MRC regarding resource issues and unforeseeable impacts and implementing addition mitigation. The agreement also address research and financial assurances.

6.0 PUBLIC INVOLVEMENT.

The NEPA process to identify the scope and content of the Draft EIS/EIR was initiated by a Notice of Intent published May 11, 1995 (60 Fed. Reg. 25243) and Correction to Notice of Intent published June 14, 1995 (60 Fed. Reg. 31321). Approximately 800 agencies, organizations, and individuals were sent copies of the NOI (and/or the Notice of Preparation under CEQA) prepared by the BLM and the County, respectively. A Notice of Exchange Proposal was also published May 12, May 19, May 26 and June 2, 1995 in the Riverside Press Enterprise and the Desert Sun, two local newspapers of general circulation.

Four public scoping meetings were held by the BLM and the County over a 2-day period to solicit public and agency comments for consideration in the Draft EIS/EIR. Scoping meetings were held in Palm Desert and Desert Center on May 31, 1995, and in Riverside and Hemet on June 1, 1995.

In addition to the public scoping meetings, a series of individual agency scoping meetings were held from February through August 1995. Participating state agencies were the California Integrated Waste Management Board, State Water Resources Control Board, California Department of Fish and Game, South Coast Air Quality Management District, and the California Air Resources Board. The Federal agencies were the National Park Service, the Biological Resources Division of the U.S. Geological Survey (formerly the National Biological Service), the Environmental Protection Agency, and U.S. Fish and Wildlife Service. Local agencies included the County of Riverside departments.

Separate scoping meetings were also held with litigants in two of the three legal challenges in the previous State Court proceedings (and who were also parties to the IBLA appeals to the 1993 ROD), Eagle Crest Energy Company and Laurence and Donna Charpied. Members of the third litigant group, the National Parks and Conservation Association and others, either sent written comments, commented in public scoping sessions, declined to meet, or did not respond to requests to meet.

Approximately 350 copies of the Draft EIS/EIR were distributed for public review and the comment period closed September 17, 1996, providing a 67-day review period. During the public review period the BLM conducted four additional public hearings on the following dates and locations: (1) August 5, 1996, Lake Tamarisk Clubhouse, Desert Center, CA; (2) August 6, 1996, Palm Springs Convention Center, Palm Springs, CA; (3) August 7, 1996, Blackrock Visitor Center, JTNP, Yucca Valley, CA; and (4) August 8, 1996, Riverside Municipal Auditorium, Riverside, CA. The hearings were conducted by a BLM Hearings Officer. During the 67-day public review period on the Draft EIS/EIR, approximately 250 letters of comment were received.

The Notice of Availability on the Final EIS/EIR was published by the EPA on January 23, 1997, beginning the 30-day public review period which ended on February 24, 1997. Approximately 375 copies of the Final EIS/EIR were distributed to individuals, groups and agencies.

Thereafter, the County of Riverside Planning Commission held six public hearings in various locations throughout the County to gather public input related to the Project, and on May 7, 1997 adopted a Resolution and Findings recommending that the Board of Supervisors certify the EIR and approve the Project. After five public hearings the Riverside County Board of Supervisors voted September 9, 1997 to approve the Project.

APPENDIX F
Ninth Circuit Order on Rehearing

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL PARKS & CONSERVATION ASSOCIATION, Plaintiff - Appellee, v. BUREAU OF LAND MANAGEMENT; UNITED STATES DEPARTMENT OF INTERIOR, Defendants, and KAISER EAGLE MOUNTAIN, INC.; MINE RECLAMATION CORPORATION, Defendants - Appellants.	No. 05-56814 D.C. No. CV-00-00041-RT Central District of California, Riverside ORDER

DONNA CHARPIED; LAURENCE CHARPIED; DESERT PROTECTION SOCIETY; CENTER FOR COMMUNITY ACTION AND ENVIRONMENTAL JUSTICE, Plaintiffs - Appellees, v. UNITED STATES DEPARTMENT OF INTERIOR, Defendant,	No. 05-56815 D.C. No. CV-99-00454-RT Central District of California, Riverside

BUREAU OF LAND MANAGEMENT; NATIONAL PARK SERVICE; BRUCE BABBITT, in his official capacity as Secretary of the Interior; TOM FRY, in his official capacity as Acting Director of the Bureau of Land Management; AL WRIGHT, in his official capacity as Acting California State Director of the Bureau of Land Management; TIM SALT, in his official capacity as Bureau of Land Management California Desert District Manager; ROBERT STANTON, in his official capacity as Director of the National Park Service,

Defendants,

and

KAISER EAGLE MOUNTAIN, INC.; MINE RECLAMATION CORPORATION,

Defendants - Appellants.

NATIONAL PARKS & CONSERVATION ASSOCIATION,

Plaintiff - Appellee,

v.

UNITED STATES DEPARTMENT OF INTERIOR,

Defendant - Appellant,

BUREAU OF LAND MANAGEMENT,

Defendant - Appellant,

No. 05-56832

D.C. No. CV-00-00041-RT
Central District of California,
Riverside

and

KAISER EAGLE MOUNTAIN, INC.; MINE RECLAMATION CORPORATION,

Defendants.

DONNA CHARPIED; LAURENCE CHARPIED; DESERT PROTECTION SOCIETY; CENTER FOR COMMUNITY ACTION AND ENVIRONMENTAL JUSTICE,

Plaintiffs - Appellees,

v.

UNITED STATES DEPARTMENT OF INTERIOR,

Defendant - Appellant,

BUREAU OF LAND MANAGEMENT; NATIONAL PARK SERVICE; BRUCE BABBITT, in his official capacity as Secretary of the Interior; TOM FRY, in his official capacity as Acting Director of the Bureau of Land Management; AL WRIGHT, in his official capacity as Acting California State Director of the Bureau of Land Management; TIM SALT, in his official capacity as Bureau of Land Management California Desert District Manager; ROBERT STANTON, in his official capacity as Director of the National Park Service,

Defendants - Appellants,

and

No. 05-56843

D.C. No. CV-99-00454-RT
Central District of California,
Riverside

KAISER EAGLE MOUNTAIN, INC.; MINE RECLAMATION CORPORATION,

Defendants.

DONNA CHARPIED; LAURENCE CHARPIED; DESERT PROTECTION SOCIETY; CENTER FOR COMMUNITY ACTION AND ENVIRONMENTAL JUSTICE,

Plaintiffs - Appellants,

v.

UNITED STATES DEPARTMENT OF INTERIOR; KAISER EAGLE MOUNTAIN, INC.; MINE RECLAMATION CORPORATION; BUREAU OF LAND MANAGEMENT; NATIONAL PARK SERVICE; BRUCE BABBITT, in his official capacity as Secretary of the Interior; TOM FRY, in his official capacity as Acting Director of the Bureau of Land Management; AL WRIGHT, in his official capacity as Acting California State Director of the Bureau of Land Management; TIM SALT, in his official capacity as Bureau of Land Management California Desert District Manager; ROBERT STANTON, in his official capacity as Director of the National Park Service,

Defendants - Appellees.

No. 05-56908

D.C. No. CV-99-00454-RT
Central District of California,
Riverside

Before: PREGERSON, TROTT and PAEZ, Circuit Judges.

The full court was advised of the petitions for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc, and the matter failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

All petitions for rehearing and rehearing en banc are DENIED

APPENDIX G
Statutes and Regulations

5 U.S.C. § 706. Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

42 U.S.C. § 4332(2)(C)

all agencies of the Federal Government shall—

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

42 U.S.C. § 4371 Congressional findings, declarations, and purposes

(a) The Congress finds--

(1) that man has caused changes in the environment;

(2) that many of these changes may affect the relationship between man and his environment; and

(3) that population increases and urban concentration contribute directly to pollution and the degradation of our environment.

(b) (1) The Congress declares that there is a national policy for the environment which provides for the enhancement of environmental quality. This policy is evidenced by statutes heretofore enacted relating to the prevention, abatement, and control of environmental pollution, water and land resources,

transportation, and economic and regional development.

(2) The primary responsibility for implementing this policy rests with State and local governments.

(3) The Federal Government encourages and supports implementation of this policy through appropriate regional organizations established under existing law.

(c) The purposes of this title [42 USCS §§ 4371 et seq.] are--

(1) to assure that each Federal department and agency conducting or supporting public works activities which affect the environment shall implement the policies established under existing law; and

(2) to authorize an Office of Environmental Quality, which, notwithstanding any other provision of law, shall provide the professional and administrative staff for the Council on Environmental Quality established by Public Law 91-190 [42 USCS §§ 4321 et seq.].

43 U.S.C. § 1716(a)-(b)

(a) Authorization and limitations on authority of Secretary of the Interior and Secretary of Agriculture. A tract of public land or interests therein may be disposed of by exchange by the Secretary under this Act and a tract of land or interests therein within the National Forest System may be disposed of by exchange by the Secretary of Agriculture under

applicable law where the Secretary concerned determines that the public interest will be well served by making that exchange: Provided, That when considering public interest the Secretary concerned shall give full consideration to better Federal land management and the needs of State and local people, including needs for lands for the economy, community expansion, recreation areas, food, fiber, minerals, and fish and wildlife and the Secretary concerned finds that the values and the objectives which Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the values of the non-Federal lands or interests and the public objectives they could serve if acquired.

(b) Implementation requirements; cash equalization waiver. In exercising the exchange authority granted by subsection (a) or by section 205(a) of this Act [43 USCS § 1715(a)], the Secretary concerned may accept title to any non-Federal land or interests therein in exchange for such land, or interests therein which he finds proper for transfer out of Federal ownership and which are located in the same State as the non-Federal land or interest to be acquired. For the purposes of this subsection, unsurveyed school sections which, upon survey by the Secretary, would become State lands, shall be considered as "non-Federal lands". The values of the lands exchanged by the Secretary under this Act and by the Secretary of Agriculture under applicable law relating to lands within the National Forest System either shall be equal, or if they are not equal, the values shall be equalized by the payment of money to the grantor or to the Secretary concerned as the

circumstances require so long as payment does not exceed 25 per centum of the total value of the lands or interests transferred out of Federal ownership. The Secretary concerned and the other party or parties involved in the exchange may mutually agree to waive the requirement for the payment of money to equalize values where the Secretary concerned determines that the exchange will be expedited thereby and that the public interest will be better served by such a waiver of cash equalization payments and where the amount to be waived is no more than 3 per centum of the value of the lands being transferred out of Federal ownership or $ 15,000, whichever is less, except that the Secretary of Agriculture shall not agree to waive any such requirement for payment of money to the United States. The Secretary concerned shall try to reduce the amount of the payment of money to as small an amount as possible.

40 C.F.R. § 1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

43 C.F.R. § 2200.0-5 Definitions.

As used in this part:

(a) Adjustment to relative values means compensation for exchange-related costs, or other

responsibilities or requirements assumed by one party, which ordinarily would be borne by the other party. These adjustments do not alter the agreed upon value of the lands involved in an exchange.

(b) Agreement to initiate means a written, nonbinding statement of present intent to initiate and pursue an exchange, which is signed by the parties and which may be amended by the written consent of the parties or terminated at any time upon written notice by any party.

(c) Appraisal or Appraisal report means a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion as to the market value of the lands or interests in lands as of a specific date(s), supported by the presentation and analysis of relevant market information.

(d) Approximately equal value determination means a decision that the lands involved in an exchange have readily apparent and substantially similar elements of value, such as location, size, use, physical characteristics, and other amenities.

(e) Arbitration means a process to resolve a disagreement among the parties as to appraised value, performed by an arbitrator appointed by the Secretary from a list recommended by the American Arbitration Association.

(f) Assembled land exchange means the consolidation of multiple parcels of Federal and/or

non-Federal lands for purposes of one or more exchange transactions over a period of time.

(g) Authorized officer means any employee of the Bureau of Land Management who has been delegated the authority and responsibility to make decisions and perform the duties described in this part.

(h) Bargaining means a process, other than arbitration, by which parties attempt to resolve a dispute concerning the appraised value of the lands involved in an exchange.

(i) Federal lands means any lands or interests in lands, such as mineral or timber interests, that are owned by the United States and administered by the Secretary of the Interior through the Director of the Bureau of Land Management, without regard to how the United States acquired ownership, except: (1) Lands located on the Outer Continental Shelf; and (2) lands held for the benefit of Indians, Aleuts and Eskimos.

(j) Hazardous substances means those substances designated under Environmental Protection Agency regulations at 40 CFR part 302.

(k) Highest and best use means the most probable legal use of a property, based on market evidence as of the date of valuation, expressed in an appraiser's supported opinion.

(l) Lands means any land and/or interests in land.

(m) Ledger account means an accounting mechanism that tracks the differential in dollar value of lands conveyed throughout a series of transactions. A ledger reports each transaction by date, value of Federal land, value of non-Federal land, the difference between these values upon completion of each transaction, and a cumulative balance and differential.

(n) Market value means the most probable price in cash, or terms equivalent to cash, that lands or interests in lands should bring in a competitive and open market under all conditions requisite to a fair sale, where the buyer and seller each acts prudently and knowledgeably, and the price is not affected by undue influence.

(o) Mineral laws means the mining laws, mineral leasing laws, and the Geothermal Steam Act, but not the Materials Sales Act, administered by the Secretary of the Interior through the Bureau of Land Management.

(p) Outstanding interests means rights or interests in property held by an entity other than a party to an exchange.

(q) Party means the United States or any person, State or local government who enters into an agreement to initiate an exchange.

(r) Person means any individual, corporation, or other legal entity legally capable to hold title to and convey land. An individual must be a citizen of the United States and a corporation must be subject to

the laws of the United States or of the State where the land is located or the corporation is incorporated.

(s) Public land laws means that body of general land laws administered by the Secretary of the Interior through the Bureau of Land Management, excepting, however, the mineral laws.

(t) Reserved interest means an interest in real property retained by a party from a conveyance of the title to that property.

(u) Resource values means any of the various commodity values (e.g., timber or minerals) or non-commodity values (e.g., wildlife habitat or scenic vistas), indigenous to particular land areas, surface and subsurface.

(v) Secretary means the Secretary of the Interior or the individual to whom the authority and responsibilities of that official, as to matters considered in this part, have been delegated.

(w) Segregation means the removal for a limited period, subject to valid existing rights, of a specified area of the Federal lands from appropriation under the public land laws and mineral laws, pursuant to the authority of the Secretary of the Interior to allow for the orderly administration of the Federal lands.

(x) Statement of value means a written report prepared by a qualified appraiser that states the appraiser's conclusion(s) of value.

43 C.F.R. § 2200.0-6 Policy

(a) Discretionary nature of exchanges. The Secretary is not required to exchange any Federal lands. Land exchanges are discretionary, voluntary real estate transactions between the Federal and non-Federal parties. Unless and until the parties enter into a binding exchange agreement, any party may withdraw from and terminate an exchange proposal or an agreement to initiate an exchange at any time during the exchange process, without any obligation to reimburse, or incur any liability to, any party, person or other entity.

(b) Determination of public interest. The authorized officer may complete an exchange only after a determination is made that the public interest will be well served. When considering the public interest, the authorized officer shall give full consideration to the opportunity to achieve better management of Federal lands, to meet the needs of State and local residents and their economies, and to secure important objectives, including but not limited to: Protection of fish and wildlife habitats, cultural resources, watersheds, wilderness and aesthetic values; enhancement of recreation opportunities and public access; consolidation of lands and/or interests in lands, such as mineral and timber interests, for more logical and efficient management and development; consolidation of split estates; expansion of communities; accommodation of land use authorizations; promotion of multiple-use values; and fulfillment of public needs. In making this determination, the authorized officer must find that:

(1) The resource values and the public objectives that the Federal lands or interests to be conveyed may serve if retained in Federal ownership are not more than the resource values of the non-Federal lands or interests and the public objectives they could serve if acquired, and

(2) The intended use of the conveyed Federal lands will not, in the determination of the authorized officer, significantly conflict with established management objectives on adjacent Federal lands and Indian trust lands. Such finding and the supporting rationale shall be made part of the administrative record.

(c) Equal value exchanges. Except as provided in § 2201.5 of this part, lands or interests to be exchanged shall be of equal value or equalized in accordance with the methods set forth in § 2201.6 of this part. An exchange of lands or interests shall be based on market value as determined by the Secretary through appraisal(s), through bargaining based on appraisal(s), or through arbitration.

(d) Same-State exchanges. The Federal and non-Federal lands involved in an exchange authorized pursuant to the Federal Land Policy and Management Act of 1976, as amended, shall be located within the same State.

(e) O and C land exchanges. Non-Federal lands acquired in exchange for revested Oregon and California Railroad Company Grant lands or reconveyed Coos Bay Wagon Road Grant lands are required to be located within any one of the 18

counties in which the original grants were made, and, upon acquisition by the United States, automatically shall assume the same status as the lands for which they were exchanged.

(f) Congressional designations. Upon acceptance of title by the United States, lands acquired by an exchange that are within the boundaries of any unit of the National Forest System, National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers System, National Trails System, National Wilderness Preservation System, or any other system established by Act of Congress; the California Desert Conservation Area; or any national conservation or national recreation area established by Act of Congress, immediately are reserved for and become part of the unit or area within which they are located, without further action by the Secretary, and thereafter shall be managed in accordance with all laws, rules, regulations, and land use plans applicable to such unit or area.

(g) Land and resource management planning. The authorized officer shall consider only those exchange proposals that are in conformance with land use plans or plan amendments, where applicable. Lands acquired by an exchange within a Bureau of Land Management district shall automatically become public lands as defined in 43 U.S.C. 1702 and shall become part of that district. The acquired lands shall be managed in accordance with existing regulations and provisions of applicable land use plans and plan amendments. Lands acquired by an exchange that are located within the boundaries of areas of critical environmental concern

or any other area having an administrative designation established through the land use planning process shall automatically become part of the unit or area within which they are located, without further action by the Bureau of Land Management, and shall be managed in accordance with all laws, rules, regulations, and land use plans applicable to such unit or area.

(h) Environmental analysis. After an agreement to initiate an exchange is signed, an environmental analysis shall be conducted by the authorized officer in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4371), the Council on Environmental Quality regulations (40 CFR parts 1500-1508), and the environmental policies and procedures of the Department of the Interior and the Bureau of Land Management. In making this analysis, the authorized officer shall consider timely written comments received in response to the published exchange notice, pursuant to § 2201.2 of this part.

(i) Reservations or restrictions in the public interest. In any exchange, the authorized officer shall reserve such rights or retain such interests as are needed to protect the public interest or shall otherwise restrict the use of Federal lands to be exchanged, as appropriate. The use or development of lands conveyed out of Federal ownership are subject to any restrictions imposed by the conveyance documents and all laws, regulations, and zoning authorities of State and local governing bodies.

(j) Hazardous substances -- (1) Federal lands. The authorized officer shall determine whether hazardous substances may be present on the Federal lands involved in an exchange and shall provide notice of known storage, release, or disposal of hazardous substances on the Federal lands to the other parties in accordance with the provisions of 40 CFR part 373. The authorized officer shall provide this notice in the exchange agreement. The authorized officer shall also provide such notice, to the extent information is readily available, in the agreement to initiate an exchange. Unless the non-Federal party is a potentially responsible party under 42 U.S.C. 9607(a), the conveyance document from the United States shall contain a covenant in accordance with 42 U.S.C. 9620(h)(3). Where the non-Federal party is a potentially responsible party with respect to the property, it may be appropriate to enter into an agreement, as referenced in 42 U.S.C. 9607(e), whereby that party would indemnify the United States and hold the United States harmless against any loss or cleanup costs after conveyance.

(2) Non-Federal lands. The non-Federal party shall notify the authorized officer of any known, suspected and/or reasonably ascertainable storage, release, or disposal of hazardous substances on the non-Federal land pursuant to § 2201.1 of this part. Notwithstanding such notice, the authorized officer shall determine whether hazardous substances are known to be present on the non-Federal land involved in an exchange. If hazardous substances are known or believed to be present on the non-Federal land, the authorized officer shall reach an agreement with the non-Federal party regarding the

responsibility for appropriate response action concerning the hazardous substances before completing the exchange. The terms of this agreement and any appropriate "hold harmless" agreement shall be included in an exchange agreement, pursuant to § 2201.7-2 of this part.

(k) Legal description of properties. All lands subject to an exchange shall be properly described on the basis of either a survey executed in accordance with the Public Land Survey System laws and standards of the United States or, if those laws and standards cannot be applied, the lands shall be properly described and clearly locatable by other means as may be prescribed or allowed by law.

(l) Unsurveyed school sections. For purposes of exchange only, unsurveyed school sections, which would become State lands upon survey by the Secretary, are considered as "non-Federal" lands and may be used by the State in an exchange with the United States. However, minerals shall not be reserved by the State when unsurveyed sections are used in an exchange. As a condition of the exchange, the State shall have waived, in writing, all rights to unsurveyed sections used in the exchange.

(m) Coordination with State and local governments. At least 60 days prior to the conveyance of and upon issuance of the deed or patent for Federal lands, the authorized officer will notify the Governor of the State within which the Federal lands covered by the notice are located and the head of the governing body of any political subdivision having zoning or other land use

regulatory authority in the geographical area within which the Federal lands are located.

(n) Fee coal exchanges. As part of the consideration of whether public interest would be served by the acquisition of fee coal through exchange, the provisions of subpart 3461 of this title shall be applied and shall be evaluated as a factor and basis for the exchange.

APPENDIX H

Declaration of Thomas Gey

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

DONNA CHARPIED, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	No. EDCV 99-0454 RT (MCx)
NATIONAL PARKS AND CONSERVATION ASSOCIATION, Plaintiff, v. BUREAU OF LAND MANAGEMENT, et al., Defendants.	No. EDCV 00-0041 RT (MCx)

DECLARATION OF THOMAS GEY

I, Thomas Gey, make the following declaration:

1. I, Thomas Gey, am employed by Bureau of Land Management as a Realty Specialist in the California Desert District Office in Riverside, California. I have been employed in this capacity from 1991 to the present. While serving as the lead Realty Specialist for land exchanges in the California Desert District Office I became familiar with the

exchange which is associated with the above-captioned matters. In this capacity, I retrieved and compiled the administrative record associated with the above-captioned matters.

2. To the best of my knowledge, the index attached to this declaration constitutes a true, correct, and complete index of the administrative record for the decisions of the Bureau of Land Management in these cases. To the best of my knowledge, the index identifies those documents considered directly or indirectly by the Bureau of Land Management in connection with the agency decisions.

3. To the best of my knowledge, and as noted on the attached one page errata listing, the documents provided to the parties prior to the briefing on the merits of these cases constitute a true, correct, and complete copy of the administrative record in this action. Each document is a true and correct copy of the original documents located in the files of Bureau of Land Management's California Desert District Office.

4. I further certify that the documents attached as exhibits to Defendants' October 7, 2002, Joint Memorandum In Opposition to Plaintiffs' Motions for Summary Judgement and in Support of Defendants' Joint Motions for Summary Judgement: *FLPMA ISSUES* and Defendants' January 13, 2003 Joint Reply Memorandum in Opposition to Plaintiffs' Motions for Summary Judgement and in Support of Defendants' Joint Motion for Summary Judgement: *FLPMA ISSUES*, are complete and accurate copies of

supplemental Administrative Record documents for the decisions of the Bureau of Land Management challenged in these cases. The supplemental Administrative Record documents include the following:

A. A report titled: *Eagle Mountain Exchange Valuation Issues* For Bureau of Land Management California State Office Sacramento, California, Effective Date September 25, 1997, By Steven J. Herzog, MAI, The Herzog Group, Inc. Filed as Exhibit A to the Declaration of Steven J. Herzog, MAI, in Support of Defendants Joint Motion for Summary Judgement (the Herzog Declaration is Docket Entry No. 79 in *Charpied et al. v. U.S. Department of the Interior, et al.*, Civ. No. EDCV 99-0454 RT (MCx).

B. A memorandum dated January 10, 2003, from the Chief State Appraiser, California, to the District Manager, California Desert District, on the subject of: "Review of Highest and Best Use Feasibility Report for Eagle Mountain Landfill". Attached to the memorandum is a copy of a review of Mr. Herzog's report shown in A above, signed by Nancy Ortiz. Filed as Exhibit A to the Defendants' January 13 Joint Reply Memorandum in Opposition to Plaintiffs' Motions for Summary Judgement and in Support of Defendants' Joint Motion for Summary Judgement: *FLPMA ISSUES.*

C. A memorandum dated January 10, 2003, from the District Manager, California Desert District to the State Director, on the subject of "Summary of Steps Taken to Supplement the Administrative Record For the Eagle Mountain Land Exchange. Filed as Exhibit B to the Defendants' Joint Reply Memorandum in Opposition to Plaintiffs' Motions for Summary Judgement and in Support of Defendants' Joint Motion for Summary Judgement: *FLPMA ISSUES.*

5. I swear under penalty of perjury that the foregoing is true and correct.

Dated this 31th day of January, 2003.

Thomas Gey
Bureau of Land Management
6221 Box Springs Blvd.
Riverside, California 92507

APPENDIX I
Memo to State Director

United States Department of the Interior
BUREAU OF LAND MANAGEMENT
California Desert District Office
6221 Box Springs Boulevard
Riverside, CA 92507-0714

IN REPLY REFER TO:
2200
CACA 30070
(CA-063.51)

TO: State Director

FROM: District Manager, California Desert

SUBJECT: Summary of Steps Taken to Supplement the Administrative Record For The Eagle Mountain Land Exchange.

On September 25, 1997, the California Desert District Manager signed a Record of Decision approving an exchange of lands with Kaiser Eagle Mountain, Inc. The decision was subject to administrative appeals, with the Interior Board of Land Appeals affirming the Bureau of Land Management's (BLM) decision on September 30, 1999. The exchange was completed on October 13, 1999, but is now the subject of litigation in the United States District Court for the Eastern District.

On November 6, 2000, the Ninth Circuit Court of Appeals issued an opinion in *Desert Citizens Against Pollution, et al. v. Bisson*, et al. 231 F.3d 1172 (9th Cir. 2000). In *Desert Citizens*, a case involving a BLM

land exchange associated with the Mesquite Regional Landfill, the Ninth Circuit found the appraisal of the federal lands was flawed because its analysis of highest and best use of the federal lands did not meet the requirements of the Uniform Appraisal Standards for Federal Land Acquisitions.

Subsequent to the Ninth Circuit's decision, the Plaintiffs in the Eagle Mountain litigation expanded their complaints to include issues considered in Desert Citizens. Plaintiffs also submitted a declaration by Stephen D. Roach, which stated that the original appraisal by David Yerke, which BLM, relied on, did not meet federal standards because it did not analyze the possibility that the highest and best use of federal lands may have been for landfill purposes.

We feel the administrative record supports BLM's decision in this case, and disagree with Plaintiff's assertions to the contrary. However, in light of the Ninth Circuit's opinion in Desert Citizens, we felt an independent analysis of whether a landfill was the highest and best use of the federal lands was justified. We were prepared to accept the results of this new analysis, regardless of its implications to the District Manager's decision of September 25, 1997.

We contracted with Steven J. Herzog, a private appraiser, to complete a new and expanded analysis of the highest and best use of the federal lands. Mr. Herzog was instructed to focus specifically on the issue of whether a landfill project was the highest and best use of the federal lands when the District Manager approved the exchange September 25, 1997.

Mr. Herzog has completed his analysis and his report has been reviewed and approved by the Chief State Appraiser in California. Mr. Herzog concluded that landfill use was not the highest and best of the federal lands as of September 25, 1997, primarily because the landfill project was not financially feasible at that time. Key to Mr. Herzog's analysis was his conclusion that as of September 25, 1997, the available information indicated a rail haul disposal facility would not be needed for another 10 to 15 years.

Aside from stating that the federal lands do not have "imminent development potential" Mr. Yerke's appraisal did not articulate why the proposed landfill project was not the highest and best use of the federal lands. Mr. Herzog's report more fully articulates why landfill use was not the highest and best use of the federal lands in 1997.

I have reviewed Mr. Herzog's report and found nothing which indicates that it is necessary to revise or revisit the District Manager's decision of September 25, 1997 approving the exchange. Section 206(a) of the Federal Land Management and Policy Act of 1976 provides: "**..when considering the public interest the Secretary concerned shall give full consideration to ... the needs of State and local people...**" The administrative record clearly demonstrated that the public interest would be well served by the exchange because, among other benefits, it facilitated a project meeting the needs of State and local residents and met all other statutory and regulatory requirements. In the Record of Decision signed September 25, 1997, the District

Manager specifically explained how the exchange would serve the public interest.

Mr. Herzog's conclusion that the Eagle Mountain Landfill was not financially feasible in 1997, does not diminish the public interest the project could serve in meeting long term waste disposal needs of State and local residents. In fact, while Mr. Herzog concluded the project was not financially feasible in 1997, he acknowledged that such rail-haul landfill facilities could still serve to meet the long term landfill capacity needs in southern California.

Mr. Herzog's findings are also fully consistent with the conclusions in the draft Environmental Impact Statement that additional landfill capacity was needed to meet long-term demands (i.e. 1995-2050) for the Southern California region. After giving due consideration to Mr. Herzog's report, I have concluded the District Manager's determination in the September 25,1997 Record of Decision that the exchange was in the public interest was well supported by the information available at the time and remains valid.

APPENDIX J
Memo re Feasibility Report

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
1 California State Office
2800 Cottage Way
Sacramento, CA 95825

In Reply Refer to:
9300 (930)

January 10, 2003

Memorandum

To: District Manager, California Desert District

From: Chief State Appraiser, California

Subject: Review of Highest and Best Use Feasibility Report for Eagle Mountain Landfill

The appraiser was asked to provide a consulting report which analyzed the Eagle Mountain Land Exchange property's highest and best use potential for landfill as of September 25, 1997. The property consists of 3,481 acres in the proximity of the Eagle Mountain Mine in Riverside County California.

Purpose of the Consulting Report: Mr. Herzog states in his Summary of Problems that the primary purpose of his analysis is to "provide an analysis of the financial feasibility of the landfill use as of the effective date." As stated prior, the effective

date is September 25, 1997. In order to determine the financial feasibility of the property's potential use for a landfill a discounted cash flow analysis is the most effective tool used in conjunction with an analysis of the landfill market at the time specified. It appears that Mr. Herzog did a very thorough job of both of these analyses in his report. The appraiser devotes approximately 62 pages to documenting the research he has done into the market and demand for landfill in Southern California during the time leading up to the effective date of his report. He uses and quotes a variety of publications, newsletters, and Journals.

Additionally, Mr Herzog was asked to address valuation issues raised in association with BLM's reversionary interest in a townsite located on the property.

Purpose and Scope of the Review: Please note that the report under review is not an appraisal and no value conclusion was rendered. The purpose of my review is to evaluate the research completed and the resulting conclusions of the consulting report based on the information presented and in the context of the instructions given. My review will be used by BLM management. I understand that this is a matter in litigation and my review may be used by DOJ in defending the litigation.

Standard Rule 3 of USPAP relating to Appraisal Review, Development, and Reporting states *"The review requirements in this Standard do not apply to:"* among other things, *"an appraiser's study of work prepared by other types of experts, such as engineers or other consultants, or to work prepared by an*

appraiser in a appraisal consulting assignment under Standards 4 and 5,"

Although my review does not necessarily constitute a USPAP Standard 3 Appraisal Review, for practical and organizational purposes, my review will cover similar items required in a Standard 3 Appraisal Review where applicable. The consulting report will be reviewed in the context of Standard Rule 4 USPAP requirements and applicable federal standards.

This review is based on the my analysis of the logic and information contained in the report, my knowledge of the market area and accepted appraisal methodology, and my knowledge and understanding of applicable professional and federal appraisal standards including The Uniform Standards of Professional Appraisal Practice (USPAP), the Uniform Appraisal Standards for Federal Land Acquisitions, and the 43 CFR 2201.3-2 and 3-3.1 accompanied the appraiser on a field inspection of the subject property on June 13, 2002.

My review, relies on the landfill research and information provided by Mr. Herzog in the report and attachments and information gathered from my participation in numerous discussions with specialists in the landfill industry pertaining to the industry in general and the analysis of this property as a potential landfill.

Competency: Determining the Federal property's feasibility for a potential landfill as a highest and best use was a requirement for this

assignment as per the instructions. The appraiser has a diverse background in real estate appraisal and specializes in appraisals of special use properties. He stated in his qualifications that he had previously appraised the federal lands involved in the proposed Mesquite Regional Landfill. In *Desert Citizens Against Pollution v. Bisson*, Civ. No. 96-2011-B (JFS) (S.D. Cal.) The District Court found that Mr. Herzog's appraisal report cured any defects found in the original appraisal by the Ninth Circuit in the original appraisal in that case with regard to landfill use. He conducted considerable research for this assignment which afforded him an in-depth understanding of the history of the landfill industry and market conditions for southern California during the time frame relevant to the date of this analysis. Additionally he engaged experts in landfill engineering, appraisal, and economic analysis as subcontractors to assist in development of the report's conclusions. These actions reinforced his competency in completing this consulting assignment according to USPAP standards.

Appraiser's Use of Consultants: The appraiser employed experts in the fields of landfill valuation, engineering, and economics to assist in developing key aspects of the analysis. The appraiser describes the UAS standard that applies to the use of consultant reports and how he has met that standard. He described his required outputs from their reports, how these would be used in the analysis, and the general qualifications of the consultants as experts in their fields. My review indicates that the appraiser used these consultants and their contributed reports and information

appropriately and in compliance with applicable standards.

Consultants used were: Rencon Research Corp, a firm specializing in landfill economics, provided analysis regarding an appropriate discount rate applied to potential royalty income for landfill lands. EMCON Engineering firm with landfill experience, analyzed the time line and process for permitting and where Eagle Mountain was within that process as of September 25,1997 and also provided estimates of the costs related to obtaining permits. Jerry Jones, MAI, an appraiser with considerable landfill valuation experience, assisted in providing consulting services to Mr. Herzog and royalty agreement information pertinent to the Discounted Cash Flow Analysis. Additionally Mr. Herzog states that Mr. Jones actually reviewed his report, although no written statement from Mr. Jones is attached to the report.

The credentials and qualifications of the consultants appear to be more than adequate for providing appropriate landfill analyses and information to Mr. Herzog. As noted above, the District Court in the *Desert Citizen's* case utilized Mr. Herzog's appraisal of a similar land exchange for landfill purposes to find that BLM had satisfied the Ninth Circuit's ruling in that case. We are therefore very familiar with Mr. Herzog's work and those of the consultants and confident of their competency in this case.

Summary of Risk Factors Unique to Eagle Mountain: The appraiser acknowledges the special

risk factors unique to the Eagle Mountain's potential use as a landfill. (1) It's proximity to Joshua tree National Park will draw close monitoring of off-site impacts, i.e. noise, air and water quality, odors, and lighting issues are among them. Any change to the ecosystem will draw significant attention. (2) Over 1/3 of the property remains without permits, raising the risk, feasibility, and competitiveness of the project due to the uncertainty of ever getting permits. (3) A proposal by Energy Crest Energy Corporation to use two of the (Eagle) pits for water reservoirs. The two pits have an elevation differential conducive to hydroelectric power generation. It does not appear that this project could co-exist with a landfill. Although, the first permit application was denied it has since been re-submitted.

Business Value Considerations: Starting on page 10 of his report Mr. Herzog has ensured that his analysis will demonstrate the value attributable to the land or real estate and not the business by using the most reliable method for this purpose that is widely accepted by the appraisal industry and the courts i.e., the royalty income methodology. He quotes from several resources on this approach including a 1981 court case. This is well established method of valuing the real estate rather than the business. Jim Eaton, MAI, SRA, states in his book *Real Estate Valuation in Litigation: "The appraiser should capitalize the rental, or royalty, income that would be generated by the property, rather than the business income."*

Mr. Herzog goes on to define and discuss for the user other factors that will be significant to his

feasibility analysis such as Plottage or Assemblage, Excess Land and Surplus Land, and a list of Solid Waste Terms and Definitions.

He also reiterates his instruction to analyze the property on a stand alone basis and in combination with other ownerships. The EMCON report concludes that the subject BLM lands would not have been financially feasible, as of the effective date of the report, on a stand alone basis nor would the Mine Reclamation Corporation (MRC) property stand alone as a landfill. However, Mr. Herzog is expected to draw his own conclusions based on his own analysis of the property from a market perspective.

Adequacy of the Original Eagle Mountain Appraisal: As the Reviewer of this report, I feel it is important to discuss significant aspects which triggered this assignment and comment on how they were addressed in Mr. Herzog's report. An appraisal of property is a significant document which helps support a "*rational basis*" for BLM's decision to complete a land exchange. It also assists the BLM in *"articulating a rational connection between the facts found and conclusions made."* One important conclusion reached allowing the Eagle Mountain exchange to take place was that *"the value of the public lands conveyed away is equal to the value of the non-federal lands to be acquired, taking into account any cash included as part of the exchange."* The quotes are from the Ninth Circuit Court Ruling in *Desert Citizens Against Pollution v. Bisson*, (9th Cir. 2000).

BLM's land exchange with Kaiser is being challenged in federal court. The original appraisal completed by David Yerke, MAI supported an "equal value" exchange. In light of the *Desert Citizen's* ruling referenced above, BLM expected the validity of the appraisal completed for the Eagle Mountain land exchange to be an issue. The contention was expected to be similar to the Mesquite Landfill case in that the highest and best use analysis did not adequately consider municipal landfill as a possible highest and best use for the "selected lands", even though that was the known intended use. The assumption being that if the landfill use had been more thoroughly analyzed the value would have been significantly different. This would call into question the value conclusion and whether the Eagle Mountain Exchange was an equal value exchange as required by FLPMA and BLM regulations.

The subject property was not a permitted and entitled landfill property as of September 25, 1997, (Date of the ROD). Therefore, it could not actually be used as a landfill as of that date. Nevertheless, because that was Kaiser's intended use, it is nit unreasonable for the property to be evaluated for landfill potential as of the date of the decision.

As a result of the Ninth Circuit's decision in *Desert Citizens*, the BLM desired a thorough and independent analysis of the potential for landfill use of the public lands as of September 25, 1997 to determine if, indeed, landfill would have been a feasible highest and best use. If the analysis concluded that it was, then it is possible that a significant difference in value could have resulted for

the selected lands in the Eagle Mountain Land Exchange.

Issues Related to Highest and Best Use (HBU) Analysis: The consequences of an incomplete HBU analysis is a potential mis-judgment of the highest and best use conclusion for the property. This becomes especially germane when the value conclusion is significantly effected.

In reviewing this report I find that Mr. Herzog considered the potential use of the subject property as a landfill in great depth. He completed a detailed study of the waste management industry during the time frame of the date of this analysis, 1997 (reference pages 15 through 78). Excerpts from numerous articles and reports published at that time are included that demonstrate the complications of predicting the potential need for rail haul waste facilities; the difficulties in developing and permitting such facilities and describe the potential for extremely high monetary returns if a developer is successful in the entitlement process and a facility becomes operational. The report cites numerous regulations that affect the permitting process including Subtitle C and D of the Resource Conservation and Recovery Act which had a major impact on the industry and costs of permitting starting in the early 1990s. The unpredictable and speculative nature of developing such facilities is apparent in the discussion. The appraiser estimates the time from conception to final permitting of a landfill facility in California is 10 years and costs many millions of dollars, apart from legal challenges inevitably faced by such ventures. The development

of such facilities draws a great deal of opposition from various groups. This, along with the enormous development costs and up front investment required, make such ventures extremely high risk.

Mr. Herzog thoroughly analyzed the subject property from a landfill use perspective. A potential use for a property must past each of four tests in sequence to result in a conclusion of highest and best use. Assuming that the potential landfill use had passed the first two tests of (1) **legally permissible** and (2) **physically possible** (page 15), his analysis primarily focused on steps (3) **financially feasible** and (4) **maximally productive**. If the potential landfill use passed these latter tests financially feasibility and maximally productive, this use would be considered the **highest and best use**.

As stated prior in the Competency section of my report, the services of experts in the fields of landfill appraisal, economics, and engineering were enlisted by Mr. Herzog to provide assistance and input in their specific areas of expertise relating to the analysis.

In order to properly consider the extent to which the acquired permits increase the probability of landfill as a highest and best use and affected the value of the subject, the appraiser enlisted assistance from EMCON engineering. EMCON considered the entire permit process and the position of the subject property within that process as of the effective date of the is report (Page 9, Item 4). The appraiser has stated on page 10 that, in spite of wording in the EMCON engineering report which may have

indicated a different perspective, *"The subject is being considered in its "as is" condition as of the effective date, without regard as to how it came to be in that condition. The position of the Eagle Mountain in the landfill permitting process is recognized as of September 25, 1997."*

Landfill Feasibility Conclusions: Risk is an important aspect of evaluating the potential of landfill as a highest and best use. The appraiser devotes several pages in his report evaluating several attempts, both successes and failures, by various companies in obtaining final permits to construct landfills. His conclusion (page 78) is that: *"until the final court rules on the final issue, there is no certainty of obtaining a landfill permit." "Consequently, the risk of failure is extraordinarily high. This is true regardless of how close the finish line appears to be."* The appraiser relied on economist consultant's (Recon Research) report which suggested a 29% discount rate would be appropriate for discounting the future royalty income stream from the Eagle Mountain Landfill. The discount rate did not incorporate the additional risk, after the permits have been obtained, of obtaining a waste stream contract even though significant competition exists for the waste stream in Southern California. As the reviewer I consider this discount rate reasonable, and possibly conservative, considering that an actual contract for the income producing waste stream is a presumption that may or may not materialize and, as of the date of the report, seemed an unknown as to if and when this would occur. The result of the DCF analysis in conjunction with the appraisers analysis of all other market factors including the subject

property's position in the permit process, concluded that rail haul landfill would not be an economically feasible use as of September 25,1997.

The EMCON engineering firm addressed the landfill project feasibility from the perspective of assemblage to the neighboring Kaiser lands and as a stand alone property (page 43). However, the appraiser, after completing a detailed Discounted Cash Flow (DCF) on the property provides his own conclusion of the feasibility of the subject property in any configuration on page 108: *"...because the highest capacity and most competitive landfill configuration is not feasible, the reduced capacity and more expensive per unit configurations residing on individual BLM and MRC ownerships are not feasible. This leads to the conclusion that there are no plottage or assemblage benefits to combined ownerships, and neither are there surplus and excess land situations that must be considered."*

This independent report thoroughly analyzed the subject's potential for landfill as a highest and best use and provided a feasibility conclusion based on this analysis.

Market Data Search: What, if any, premium would be paid for land as a result of intended landfill use by the buyer? This is an important question and could be helpful in determining if the subject was undervalued. The rationale being that any prudent private owner would not sell their land to a developer, knowing the intended use was landfill, without considering the value of his land in terms of a potential landfill. The buyer in this case, Kaiser,

was in the process of acquiring the permits required for landfill development of the subject at the time of the original appraisal.

To answer this question the appraiser conducted a search for comparable sales of properties with similar landfill potential. Two sales in the Western United States were found. The sales involved lands which were purchased by developers specifically for landfill development. The properties involved were similar to the subject in that they were not fully permitted. The relevance of these sales is briefly discussed below.

Lonetree Balefill in Fall River County, South Dakota was a cash sale of a non-permitted property to South Dakota Disposals Systems (SDDS). The sale date was October 26 1988, and less than one year later they received a permit to operate a landfill from the South Dakota Board of Minerals and Environment. The sale price verified by the appraiser was $80/acre which was $20 to $30/acre over the market value of the land which was $50 to $60/acre. The premium was offered by the SDDS to the land owner in order to insure continued public support from the local community. In other words, the premium was related to public relations. This site already had rail access in place and local support which made it well suited for landfill.

The second sale was for agricultural property sold to Crestline Investment Group, Inc. from two different landowners. The sale price for the two properties was $1,500/acre and $1,562.50 with the higher priced property having irrigation potential

and the seller carrying financing for $500,000. Verification of the sales by the appraiser indicated that these prices were commensurate with agricultural prices in the area. The buyer paid a commission of 10% to the Broker who helped find suitable lands and put together the deal. This site was fully permitted as of March 1998 less than a year after the sale agreement was entered into in April 1997. This property also had existing rail access in place.

The above sales presented by the appraiser are compelling evidence that lands with unique characteristics suitable for potential landfill, but without final permits, do not appear to command prices significantly higher than they would if sold for their current non-landfill uses. The sellers in both cases were well aware of the intended use. One could argue that the "public relations premium" paid for Lonetree would not have occurred had the intended use not been for landfill. Even so, the premium does not appear to be extremely high and seems insignificant when one considers that the property already had rail access and a one year permitting process compared to the average ten year process encountered in California. A developer would likely be more willing to pay a higher price for a property that could be permitted in one year than one which would take ten years or more. Additionally, there appears to have been no premium whatever paid for the Crestline property which went on to become an operational landfill.

The story of the Lonetree Balefill project is a graphic portrayal of the risk involved in landfill

ventures. Shortly after permits were issued for Lonetree the development was challenged by an environmental group. Mr. Herzog summarized the conclusion, *"After a six year battle in state and federal courts and project development costs of $5.6 million SDDS abandoned the project in 1994 but continued its legal battle."* SDDS was upheld in the U.S. Supreme Court and the amount of damages to be paid to SDDS is yet to be determined in the State Supreme Court based on the principle called *"temporary taking without compensation"*. SDDS sold the land to a local rancher for $60,000 or about $50/acre. It demonstrates that even though permits are in hand, and there is local support for the project, there is still no guarantee that a landfill can be successfully developed.

The above sales assist the appraiser in determining whether landfill developers purchase lands uniquely suited for landfill potential at premiums above surrounding lands without final permits in place. The sales indicate that there is not a significant premium paid for such lands. In addition to this, the Lonetree project indicates that the risk of failure continues to be high no matter the position of the landfill property in the permit process, *including* successful acquisition of all necessary permits.

Purchase Agreement of the Subject: The appraiser acknowledge and discussed the relevancy of the purchase agreement of the subject property. L.A. County Sanitation District and Kaiser have entered into an agreement for sale of the subject at $39,000,000 plus 4% interest from the May 2001

until June 2002. A $2,000,000 premium was to be paid conditioned on the Sanitation District being granted a CUP by the County extending operations at their current facility, Puente Hills, until 2013.

From the reviewer's perspective, aside from the fact that the date of this agreement is August 9, 2000, almost 3 years after the effective date of this analysis, there are three primary criteria that enter into the relevancy of this agreement as an indicator which would support the feasibility of Eagle Mountain as a landfill as of the date of this analysis, September 25,1997. (1) Were market conditions as of the date of the agreement reflective of the conditions as of the date of the analysis? (2) Were the motivations behind the transaction indicative of an arms length transaction? (3) Was the price based on the market value of the property for its economic highest and best use? Normally this value is determined via a *"competent appraisal"* as indicated in the Uniform Appraisal Standards for Federal Land Acquisitions UAS.

The appraiser does a very good job of analyzing this agreement against the above three criteria. His conclusions are summarized as follows:

(1) The agreement was entered into on August 9, 2000, several years after the date of this analysis. *"The proposed Eagle Mountain Landfill, of which the subject lands were to be a part, was initiated during a time of projected landfill capacity crisis for Southern California cities."* Mr. Herzog's investigation of the landfill industry during the years leading up to and after the effective date of the this report showed how

the industry projections and economic conditions for landfills changed and the projected demand for rail-haul became a long term venture. He summarizes how these changes effected the demand and feasibility of rail-haul landfills and the Eagle Mountain Landfill *"When the landfill capacity needs in the target market became long-term requirements rather than a short-term crisis, the waste company cut its losses and walked away, leaving over $45,000,000 behind."* The appraiser determines that the August 9, 2000 Sanitation District/Eagle Mountain agreement is not reflective of the same conditions that existed as of September 25,1997. These changes in the industry effected the motivation of the buyer and seller as discussed below. The prior quotes are from the appraisers report.

(2) The Sanitation District of Los Angeles County became interested only from the standpoint of insuring adequate waste disposal capacity for it's members in anticipation of their Puente Hills truck haul facility reaching capacity between 2006 and 2013. The appraiser discussed the sale motivations with the buyer and found that *"The districts had hoped that the proposed rail-haul facilities would be privately operated so that the Districts could simply pay disposal fees."* Due to market and industry changes indicated above and discussed in more detail in the report, it appeared that the Eagle Mountain Landfill and others in the area would lie dormant for some time without waste-stream contracts that would make them economically feasible. At this time the Sanitation District became interested in purchasing the Eagle Mountain and Mesquite Regional Landfill for what Mr Herzog refers to as

"insurance". The appraiser provides an article from the Waste Age, Oct 1, 2000 *"We've avoided the unknown," says Don Nellor, assistant head of the District's solid waste management department. If we were not able to acquire [these new landfills], we might have found ourselves with very limited options when we really needed them."* The article goes on to state that the Districts have *"bought the luxury of a slow transition"* from local disposal to rail disposal. The appraiser concludes *"It appears that LA Sanitation Districts felt compelled to acquire the MRL and Eagle Mountain sites as insurance of having adequate landfill space on a long-term basis in spite of financial feasibility considerations ("avoiding the unknown" – see article on page 90)."*

(3) The price agreed to appears to have had no basis in economic market value which motivates the typical buyer and seller in an arms length transaction. Rather it appears to have been based on compensating the sellers for their costs associated with permitting for rail-haul landfill purposes and eliminating all risk and costs associated with legal challenges. I have collected information from Kaiser concerning this sale. The factors stated on page 95-97 of the report relative to how the price was derived are consistent with the facts presented by Kaiser. The appraiser has also verified the facts with the buyers. The story is consistent. To summarize from page 93 of the report, "The price paid for Eagle Mountain was derived from the price paid for the MRL. The Districts's analysis associated with arriving at a price to pay for a fully permitted MRL; concluding that the districts would face similar costs in developing a similar landfill; and incorporated an

allowance for what the Districts' cost of capital would be. The Districts were well aware that the costs had been significantly greater at Eagle Mountain than at the MRL, but they were not willing to pay more for Eagle Mountain than for the MRL. An appraisal was not done in either case." In addition it appears that feasibility analysis of the Eagle Mountain property as a landfill was also not done. Apparently seeing no other offers in sight, Kaiser accepted.

The appraiser further analyzes this sale from an economic standpoint using an IRR analysis. The results do not support an economic basis for the price paid in the Sanitation District/Eagle Mountain agreement. This measures the return on capital generated or anticipated on a particular investment or portfolio over time. Ideally it would be a positive number higher than or at least at the level of inflation.

In the Eagle Mountain agreement the IRR calculated by Mr. Herzog was a negative 6.5 to 7% dependent on the receipt of the $2,000,000 incentive bonus. If the $45,000,000 was taken out of the expenses category and treated as a donation the IRR was only 4%. Only 1% higher than inflation of 3% at that time.

In addition to all of the above the sale agreement is conditioned upon having all of the zoning and permits in place for landfill development and **all legal challenges settled**. Based on this condition and the legal challenges pending, in my mind, there is no guarantee that the agreement will actually be consummated.

The appraiser's conclusion is that the pending sales price *"cannot be used as a measure of market value, especially considering how the price was established.* The agreement also reflects the *"contingent price being offered for a fully permitted rail-haul facility in the fall of 2000, not a partially permitted one in the fall of 1997."* Based on the appraiser's analysis and my own knowledge of this sale agreement I believe the appraiser's conclusion is supported. The appraiser goes on to provide a substantial quotation on page 98 from the "Yellow Book" or UAS which further supports the questionable nature of the purchase agreement as a legitimate indication for the market value of the Eagle Mountain property.

The DCF Analysis: Financial feasibility is the key test that would validate or invalidate landfill for the subject property as a highest and best use. The appraiser used a DCF analysis to determine the financial feasibility of the subject for that use as of September 25,1997. The appraiser conducted a detailed analysis of the costs and potential income of a rail haul facility. The EMCON Engineering firm was employed to provide an analysis of where the Eagle Mountain project stood within the permitting process as of September 25,1997, and verification of the costs incurred in moving the project through the permitting process up to that point. In addition EMCON determined what steps remained in the permitting process, projected costs, and a reasonable estimate of the time it would take to acquire final permits. EMCON also analyzed the demand/supply situation for landfill as of the effective date and

estimated the expected tipping fees that could be collected.

In the case where the landowner retains ownership of underlying land rather than selling it outright to a developer the landowner typically receives a royalty. The appraiser uses four private landfill land use agreements from which to extract a market derived royalty rate applicable to the subject. The economics firm RECON developed the discount rate that would be appropriate for determining the present value of the expected royalty income stream generated by the Eagle Mountain project. In reference to this approach I quote from a review that Mr. Jones conducted of the Mesquite Regional Landfill appraisal report explaining the validity of this approach: *"The Royalty Approach has many benefits for an appraiser in the valuation of the real property component of real estate. First, market data is available. Second, the Royalty Approach requires the fewest assumptions of any procedure including the Cost or Sales Comparison Approach. Third, it is commonly used in the valuation of wasting assets and landfills. Fourth, although the available market royalty data includes comparables outside the state, the data is considered relevant because landfills are regulated by the federal government, which lends to their uniformity and applicability as market data."* In addition there is further support for this methodology above in the "Business Value Considerations".

The appraiser uses an income projection period of 91 years in the DCR as indicated from the estimated life of the landfill EIS/EIR, once activated. Normally a shorter time frame is used due to the fact than

income beyond 25 or 30 years begins returning a nominal present value. The appraiser seems to acknowledge that fact by pointing out that the final year's royalty contributes only $0.01 to the NPV. I don't consider this long projection period to be a significant factor in the final conclusion of the analysis since it would only nominally effect the final number generated.

Feasibility Conclusion From the DCF: The results of the DCF or Income Approach to value for the lands associated with the Eagle Mountain Landfill is an NPV of $2.5 million. The appraiser states that *"With the benefit of hindsight, the NPV of the net income to the landfill would have had to exceed $13 million in 1997 just to make it feasible to press on with the permitting effort not the $2.5 million indicated by the DCF."* His conclusion: *"The combination of the appropriate discount rate and a long period of time before the waste stream, and associated income arrives, drives the NPV below the level of financial feasibility."*

The use of the reports generated by both EMCON and RECON were helpful to the appraiser in developing realistic inputs for the DCF analysis. My review of the analysis indicates that the inputs were reasonable and derived from credible sources including the market. The conclusions are considered to be reasonable and supported.

Why did Kaiser persist in the face of infeasibility of the landfill enterprise?: In summary the appraiser answers this question: BFI had contributed $45 million of the $49 million that

had been spent at the time of their departure in 1994 leaving behind their $45 million dollar investment for better more feasible prospects elsewhere. Quoting from page 108 of Mr. Herzog's report: The remaining proponents had only $4 million invested, but the only way to recover any of the investment was to press on with the permitting effort." Furthermore "the expectation constantly existed that the time when final permits would be obtained was near at hand." Having only $4 million of their own invested and the leverage of $45 million left by BFI they felt it was worth the risk and investment to persist in the permit process. Acquisition of the permits was the only way to make the property marketable and possibly recover their investment in a possible sale. This finally came to pass with The Sanitation District Purchase Agreement, however this agreement is still subject to substantial contingencies including "all litigation being resolved' and has not, as of yet, been consummated.

The Townsite Reversion: The appraiser was also asked to determine if the original appraisal had undervalued the reversionary interest of the Eagle Mountain Townsite. This requirement stems from a declaration from Mr. Roach, a fee appraiser who criticized the original appraisal for valuing the townsite in "fee simple" and not considering the contribution of either the improvements (consisting of homes) or the income from the prison lease. The BLM had determined at the time of the original appraisal that Kaiser was in compliance with the terms of the reversion clause. Mr. Herzog states that *"Most of the structures associated on the townsite were in a state of disrepair in 1996 when the appraisal was done. This*

was also the situation when I inspected the property." I concur with this statement since I have been on the property and viewed the structures both in 1996 and in June of 2002.

Mr. Herzog takes into account the extreme remote desert location of the townsite coupled with the close proximity of open mine pits and huge piles of mine tailings, combined with the overall unattractive setting of the townsite. The structures were originally built to provide basic housing for the employees of the mine. The vast majority are now deserted and dilapidated. A few are being used to shelter employees of the mine office and prison being leased on die property. The "prison and associated commercial uses" referred to by Mr. Roaches declaration have been producing a negative net operating income for Kaiser from 1996 through 2001. The lease is extended from year to year and is tenuous.

The results of Mr. Herzog's investigation into this is: *"For reasons detailed above, the reversionary interest in this site appears to have little if any market value. The approach taken in the appraisal simplified the appraisal assignment, and was probably to BLM's advantage. It certainly appears that the BLM's actual interest in the townsite was not undervalued in the appraisal."*

REVIEWER'S CONCLUSION

From my review it appears that Mr. Herzog has been conscientious in providing an independent analysis and his report meets applicable USPAP and

Federal standards and the requirements of the instructions for the assignment provided by BLM. He has thoroughly analyzed the subject's potential for landfill as a highest and best use, using appropriate methods and consultants, and provided a feasibility conclusion based on his analysis. As the reviewer, I believe that the appraiser has addressed concerns relative to the landfill as a potential highest and best use as of September 25, 1997. He has also effectively addressed the townsite reversionary interest value issue.

Nancy Ortiz
Chief State Appraiser

Attachment – Assignment Instructions

REVIEWER'S ASSUMPTIONS AND LIMITING CONDITIONS

1. The review memorandum is based on information and data contained in the report which is the subject of the review. Data and information from other sources may be considered. If so, they are identified and noted as such.

2. It is assumed that such data and information are factual and accurate.

3. The reviewer reserves the right to consider any new or additional data or information which may subsequently become available.

4. Unless otherwise stated, all assumptions and limiting conditions contained in the report, which

is the subject of this review, are also conditions of this review.

REVIEWER'S CERTIFICATION

I certify that, to the best of my knowledge and belief:

– The facts and data reported by the review appraiser and used in the review process are true and correct

– The analyses, opinions, and conclusions in this review report are limited only by the assumptions and limiting conditions stated in this review report, and are my personal, unbiased professional analyses, opinions and conclusions.

– I have no present or prospective interest in the property that is the subject of this report and no personal interest with respect to the parties involved.

– I have no bias with respect to the properly that is the subject of this report or to the parties involved with this assignment

– My engagement in this assignment was not contingent upon developing or reporting predetermined results.

– My compensation is not contingent on an action or event resulting from the analyses, opinions, or conclusions in, or the use of, this review.

– My analyses, opinions, and conclusions were developed and this report was prepared in conformity with the *Uniform Standards of Professional Appraisal Practice.*

– I did personally inspect the subject property of the report under review.

– No one provided significant professional assistance to the person signing this review report.

– To the best of my knowledge and belief, the reported analyses, opinions and conclusions were developed, and this review has been prepared in conformity with requirements of Code of Professional Ethics and the Standards of Professional Appraisal Practice.

Reviewer:_____ Date: 1/10/03

Instructions for an analysis and report on valuation issues of the federal lands in the Eagle Mountain Land Exchange

Background

On November 6, 2000, the Ninth Circuit Court of Appeals issued its decision in *Desert Citizens Against Pollution v. Bisson* (the Mesquite case). The court held that the appraisal of the federal lands in the exchange was flawed because it did not consider landfill as a possible highest and best use of the public lands even though all parties were aware that the exchange proponent intended to use the public lands for landfill purposes.

On September 25,1997, the Bureau of Land Management (BLM) issued a decision approving a land exchange with Kaiser Eagle Mountain, Inc. (Kaiser), involving public lands surrounding the Eagle Mountain Mine, in Riverside County.

Simultaneous with the land exchange process, Kaiser and Mine Reclamation Corporation sought State and local permits for a landfill which would involve some of the public lands.

The land exchange was completed October 13, 1999, and the exchange is currently the subject of litigation in federal court. The BLM expects the validity of the appraisal completed for the Eagle Mountain land exchange may be an issue in the litigation given the Mesquite decision.

Since BLM is a party to the lawsuit, we are seeking an independent analysis as to whether landfill use could have been the highest and best use of the federal lands as of September 25, 1997. We expect and intend that the analysis would supplement BLM's administrative record and may serve as a reference tool for the litigation.

Scope of work

BLM desires a landfill-use financial feasibility analysis and report prepared in conformity with the *Uniform Appraisal Standards For Federal Land Acquisitions* (Washington, D.C. 2000) and the *Uniform Standards of Professional Appraisal Practice* (2002 edition), to the extent appropriate. The analysis and report must also conform to 43 Code of Federal Regulations 2201.3-2&3.

In addition, an independent opinion should be offered and supported as to whether or not the "townsite" valuation methodology in the appraisal resulted in an undervaluation of this parcel.

Instructions

In completing this report, the appraiser is to use a date of value of September 25, 1997, and is to give appropriate consideration to all actions which occurred up to that date which may affect the financial feasibility of landfill use of the lands and their value. This would include, but not be limited to the land exchange agreement between BLM and Kaiser and actions taken by Kaiser, Mine Reclamation corporation, and various public entities in the landfill permitting process.

1.) **Financial feasibility analysis:** The BLM's primary concern centers around the question of whether a landfill is the highest and best use of the federal lands. In order for landfill use to be the potential highest and best use of the property, it would have had to be a financially feasible use as of the effective date. You should consider and explain the process of determining financial feasibility of landfill use. The BLM requires a complete review of the facts in this case pertaining to this issue. Your analysis and conclusions must be thorough, well documented and supported. You are to retain whatever experts you may need as subcontractors to assure the completeness of your research and analysis.

In conducting an analysis of the subject property for use as a landfill you should employ all applicable means of analysis.

In addition to considering a highest and best use of the property as a stand alone landfill, you should

consider the possible highest and best use of assemblage of the federal lands with Kaiser's lands for use of the merged lands for landfill purposes.

The analysis should consider the federal lands in their current condition, but should disregard any recognizable environmental condition that may require remediation to make the property suitable for landfill purposes.

In reporting your analysis and conclusions, you should cite appropriate appraisal reference material.

2.) **Townsite:** As part of this exchange, the U.S. conveyed the reversionary interest held on a 460 acre townsite parcel conveyed under special legislation. With regard to the townsite parcel, the appraiser is to research the issues relating to this parcel and offer explanations and conclusions as to whether or not the original appraisal underestimated the value of the interest in this parcel.

Exercise Independent Judgment

You must exercise independent judgment. This instruction means that you should consider other possibilities not discussed in this set of instructions.

APPENDIX K
Environmental Impact Statement (Excerpts)

1.3.1 Project Purpose and Need

The primary purpose of the Project is to develop a new-Class III nonhazardous municipal solid waste landfill to meet the projected long-term demand for environmentally sound landfill capacity in Southern California; provide a long-term income source from the development of a nonhazardous municipal solid waste landfill; find an economically viable use for the existing mining by-products at the Kaiser Eagle Mountain Mine site, including use of existing aggregate and overburden; and provide long-term land use and development goals and guidance for the Townsite.

Several recent studies documenting the need for additional landfill capacity in Southern California indicate that additional capacity is needed to meet the long-term demands (i.e., 1995 to 2050) and possible short-term needs (i.e.. 1995 to 2000) of the Southern California region (California Integrated Waste Management Board [CIWMB], 1992: CIWMB, 1994, Draft Countywide Siting Elements—for the seven counties viewed as potential sources of waste for the proposed landfill—1995 and 1996). Additional capacity is also required for counties and municipalities in Southern California to satisfy the legal requirements of AB 939 to demonstrate adequate waste disposal capacity. The solid waste capacity in southern California changes often due to a number of factors, including: (1) the closure of small, inefficient landfills as new regulations take

effect; (2) the development of larger regional sites; (3) the uncertainty of permitting efforts of new and expanded landfills; (4) litigation over land use issues of landfills and (5) the privatization of publicly owned landfills. These factors necessitate that cities and counties undertake long-term planning to ensure that adequate capacity is available.

The discussion below of waste capacity in the Southern California region is based on projected short-, medium-, and long-term needs. Future needs are based on several continuing and changing trends: (1) increase in population (California's population is expected to more than double from its current 30 million to more than 60 million by the year 2040 [California Department of Finance. 1993]); (2) expanded waste diversion and recycling, which is reducing the amount of material being disposed of in landfills; and (3) landfill closures and development proposals that will affect future disposal capacity.

1.3.1.1 Waste Diversion

In September 1989, the California Integrated Waste Management Act (AB 939) was signed into law. Among other provisions, AB 939 requires each city and unincorporated county area to prepare a Source Reduction and Recycling Element (SRRE) describing how it will meet solid waste diversion goals of 25 percent by the year 1995 and 50 percent by the year 2000. All California cities and unincorporated county areas have prepared and submitted their SRREs to the CIWMB. AB 939 also requires that these jurisdictions have a minimum of 15 years of waste disposal capacity. Preliminary

assessments made by the CIWMB indicate that most jurisdictions will meet or come close to meeting the 1995 diversion goals of 25 percent. Since 1990, per capita waste generation has declined from 7.9 pounds per day to 5.9 pounds per day (*Toward Ensuring Adequate Landfill Capacity, Integrated Waste Management Planning Study*, May 1995). Much of this decrease is attributable to increased source reduction, recycling and composting activities, and a prolonged statewide economic recession.

1.3.1.2 Disposal Capacity Requirements

In 1992, the CIWMB reported that there was a critical landfill capacity shortfall, with 70 percent of California's counties expected to have fewer than 15 years of remaining disposal capacity. Ten of the counties that comprise approximately 40 percent of the state's population had fewer than 5 years of landfill disposal capacity.

The projected disposal shortages in capacity have been slightly alleviated in the short term due to repermitting and expansion of some existing landfills and an overall 20 percent statewide reduction in disposal from 42.5 million tons in 1990 to 34 million tons in 1993. As discussed below, there is still, however, a need for additional disposal capacity, especially in Southern California. Even if all cities and the unincorporated county areas in Southern California comply with AB 939 requirements and divert 50 percent of their waste from landfills by the year 2000, six counties in Southern California (Riverside, Los Angeles. San Bernardino, Santa Barbara, San Diego, and Ventura) will still have

fewer than 15 years of fully permitted disposal capacity (from existing facilities and permitted expansions). Only the Counties of Orange and Imperial have at least 15 years of existing permitted disposal capacity, as required by AB 939 (see Section 1.3.2.1):

The disposal capacity requirements for the Counties of Riverside, San Bernardino, Los Angeles, Orange, Santa Barbara, San Diego, and Ventura are presented in the following sections for three periods of time: short term (1995 to 2000), medium term (1995 to 2020) and long term (1995 to 2050). These requirements are based on information presented in the draft countywide siting elements for each of these counties to the year 2010, and these data are extrapolated for subsequent years (see Section 9, References). The documents on which this discussion of disposal capacity are based are:

- Los Angeles County, Draft Countywide Siting Element (January 1996)

- Orange County, Draft Countywide Siting Element (February 1995)

- Riverside County, Draft Countywide Siting Element (January 1996)

- San Bernardino County, Draft Countywide Siting Element (November 1995)

- Santa Barbara County, Draft Countywide Siting Element (April 1996)

- San Diego County, Draft Countywide Siting Element (August 1995)

- Ventura County, Draft Countywide Siting Element (August 1995)

These counties, which are the planned service area of the Eagle Mountain Landfill, are collectively referred to in this EIS/EIR as the "Region" or "seven-county Region." Various options being considered by decisionmakers in the respective counties for developing the required additional disposal capacity for each of the three time periods are discussed below. These options are detailed in the various counties' draft countywide siting elements. In this discussion, "local landfill disposal facilities" refer to facilities that would be primarily, if not totally, served by trucks. "Remote facilities" refer to landfill disposal facilities that would be primarily, served by rail because of longer haul distances.

Short-term Disposal Capacity Requirements. In the short-term period (1995 to 2000), most areas in the seven-county Region generally have sufficient available disposal capacity to meet their needs. Several counties and/or particular wastesheds (i.e., the collective areas where waste is generated) within a specific county could, however, have inadequate local disposal capacity to meet their needs, as discussed below.

Riverside County. Adequate permitted landfill capacity exists in the County of Riverside to meet its short-term needs. In the eastern portion of the County of Riverside, however, a shortfall in disposal

capacity could occur as early as the year 2002, particularly in the Coachella Valley area. The area is serviced by two landfills: (1) Coachella Landfill, which is anticipated to close in 1997 and (2) the Edom Hill Landfill, which is anticipated to close in the year 2002 if the waste stream from the soon-to-close Coachella and Mecca II landfills are diverted to Edom Hill Landfill and it does not receive a permit from the CIWMB and Regional Water Quality Control Board (RWQCB) for a 40-foot vertical expansion that will provide 4 years of additional capacity. The Coachella Valley Association of Governments (CVAG) has issued two requests for proposal (RFP) and received proposals. One is to build a transfer station and the other is to obtain necessary landfill capacity for up to 1,500 tons of waste per day. (CVAG comprises portions of the unincorporated County of Riverside and the municipalities of Palm Springs, Cathedral City, Rancho Mirage, Palm Desert, Indian Wells, La Quinta, Indio, Coachella, and Desert Hot Springs.) One of the closest potential sites for disposal of Coachella Valley waste is the proposed Eagle Mountain Landfill. The County is also examining the possibility of shipping waste from the Coachella Valley to the Badlands Landfill located in the western portion of the County, although this action could require a permit revision. A summary of the disposal bids submitted to CVAG is included in Appendix B.

San Bernardino County. San Bernardino County has overall adequate total landfill capacity to the year 2000. As discussed in the section on medium-term capacity, the valley area of the county,

which has 80 percent of the population, could run out of capacity as early as the year 2001.

Los Angeles County. By the year 2000, Antelope Valley, Azusa, BKK, Bradley West, Chiquita, Lancaster, Lopez, and Spadra landfills will have reached their permitted capacity or their permit to operate will have expired. These potential closures represent a loss of more than 40,000 tons per day of permitted disposal capacity. As noted in the Preliminary Draft of the Los Angeles County Countywide Siting Element (January 1996), "a daily disposal capacity shortfall of approximately 4,600 tons per day (6-day week) will be experienced by 1999. This shortfall would increase to nearly 18,000 tons per day (6-day week) upon expiration of the Puente Hills Landfill Conditions Use Permit in November 2003." This analysis considered: (1) Only the existing permitted disposal capacity; (2) full implementation of AB 939 waste diversion programs; and (3) the full use of the permitted disposal capacity available at the recently approved expansion of the Sunshine Canyon Landfill beginning July 1, 1996.

The shortage disposal capacity is especially acute for waste generated within the City of Los Angeles (City), which generates more than a third of the County's waste. As a result of previous legal disputes, the City is restricted from using three of the Los Angeles County-operated landfills (i.e., Puente Hills, Scholl Canyon, and Spadra). In addition, only a small portion of the City of Los Angeles that falls within the Calabasas wasteshed is authorized to use Los Angeles County's Calabasas Landfill. Consequently, the City depends primarily on the City-operated

Lopez Canyon Landfill and the privately operated Bradley West, BKK, and Chiquita Canyon Landfills for the disposal of up to 2 to 3 million tons of waste a year. As noted previously, all four of these landfills will have reached their permitted capacity or their permit to operate will have expired by the year 2000. Sunshine Canyon Landfill, with its expected reopening in mid-1966, will provide some of the needed disposal capacity for City-generated waste; but this additional capacity will be insufficient to meet total City short-term disposal needs.

Orange County. Orange County has adequate short-term disposal capacity. Because of its recent bankruptcy, Orange County has recently decided to allow importation of approximately 6,500 tons per day of waste from surrounding counties. Contracts have been signed, and waste is being or will soon be imported from the counties of San Diego and Los Angeles.

Santa Barbara County. By 1999, the County of Santa Barbara will have inadequate daily disposal capacity when Tajiguas and Foxen Canyon Landfills reach permitted capacity. Santa Barbara County is currently trying to obtain permits to expand Tajiguas Landfill. If the permit to expand Tajiguas Landfill is not obtained, Santa Barbara County could have a shortfall in disposal capacity of 600 tons per day by the year 2000.

San Diego County. Although the County of San Diego currently has adequate short-term disposal capacity, several cities in northern San Diego County are investigating alternative, remote disposal sites,

including out-of-state facilities because of high local disposal costs. Two cities are currently hauling their waste approximately 150 miles by truck to a landfill in Los Angeles County. One city is hauling waste to a landfill in La Paz County, Arizona.

Ventura County. Although Ventura County has adequate short-term disposal capacity, the western pan of the county will experience a 1,200-tpd shortfall of capacity as a result of the scheduled closure of Bailard Landfill in May 1997.

Summary of Short-term Disposal Capacity Requirements. In summary, the amount of waste, if any, that will be hauled to remote landfills in the short term is difficult to estimate. Many factors will determine where jurisdictions dispose of their waste, including: (1) the repermitting and expansion of local landfills, (2) the cost of local versus remote disposal, and (3) the possibility of intra-county transfer of waste. As noted in the Draft Countywide Siting Elements cited above, many of the counties in the Region have expressed interest in having the capability to dispose of waste in remote locations as a backup resource because: (1) there are numerous uncertainties associated with predicting precisely the availability of adequate landfill capacity, and (2) some existing landfills could be closed prior to the expiration of their permit due to noncompliance with environmental regulations and the high cost of compliance. In a draft report prepared by staff of the Southern California Association of Governments (SCAG, August 1995), the following strategic public policy action was recommended to facilitate the disposal of solid waste in Southern California: "Local

governments in Southern California should actively pursue a coordinated effort to cite one or more environmentally safe rail-haul solid waste sanitary landfills in the region, including the provision of the needed recycling and transfer facilities."

The following narrative was included in this report to justify the need for this public policy action:

"'Close-in' existing sanitary landfill sites are reaching capacity in much of the urbanized parts of the region and new environmentally and politically acceptable sites are becoming increasingly more difficult to find and put in operation. A number of rail-accessible sites are in various stages of development both within the region and in adjacent states. Some uncertainties exist about the future of solid waste rail-haul to other states, which point to the importance of in-state sites. In order for rail-haul sites to be successful economically, waste commitment agreements are an important ingredient that require a coordinated regional effort. Sanitary landfills need to be environmentally engineered to provide the safest level of protection. It is important that local governments and the private sector coordinate their actions to provide necessary recycling and transfer facilities to support waste-by-rail operations and that these efforts be closely tied to the timing of landfill beginning operations."

Medium-term Disposal Capacity Requirements. In the medium term (1995 to 2020), approximately 481 million tons of waste from the seven-county Region will require disposal. This estimate assumes that all cities and unincorporated county areas

achieve a 50 percent diversion of waste by the year 2000, as mandated by AB 939. A summary of the annual disposal requirements and the total amount of waste for the 25-year period for each of the seven counties is presented in Table 1-4. Waste requiring disposal could be reduced if communities exceed the 50 percent mandate for the amount of waste that is reduced, recycled, and composted.

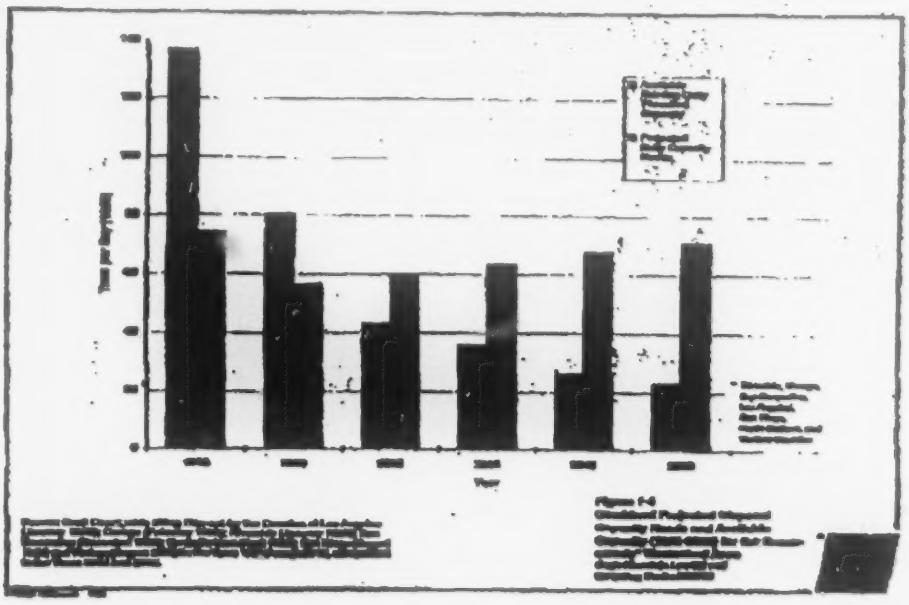

Figure 1-4

Based upon the projected disposal tonnages as presented in Table 1-4, there is inadequate existing permitted disposal capacity in the Region to meet its medium-term needs. As shown in Figure 1-4, a shortage in region wide daily permitted disposal capacity will occur sometime between the years 2000 and 2005 if no new capacity is obtained through repermitting or expansion of existing landfills or the

development of new landfill capacity. By the year 2020, approximately 48,000 tons per day of additional permitted disposal capacity will be required to meet the Region's needs. While, overall, there is a clear need for additional disposal capacity, the need varies considerably from county to county and within specific wastesheds in some counties. A discussion of the medium-term waste disposal capacity needs for each of the seven counties is presented below.

Table 1-4
Projected Waste Disposal of Seven-County Wasteshed

	Average Tons per Year* (millions)				Total Tons Years 1995 – 2000 (million tons)
County	Year 1995	Year 2000	Year 2010	Year 2020	
Los Angeles	11.7	8.6	9.9	10.9	226.0
Orange	3.9	2.8	2.9	3.0	74.8
Riverside	1.3	1.3	1.6	2.0	39.7
San Bernardino	1.5	1.3	1.3	1.5	35.4
Santa Barbara	0.6	0.4	0.5	0.6	13.0
San Diego	3.4	2.6	3.0	3.7	76.0
Ventura	0.8	0.6	0.6	0.7	16.5
Total	23.2	17.6	14.8	22.4	481.4
Daily Disposal Tons per Day 6 days/week	74,460	56,500	63,500	71,100	

*These figures assume that communities will meet the waste diversion requirements of AB 939 (i.e., 50 percent of waste generated will be diverted from landfills by the year 2000).

Source: Draft Countywide Siting Element for the Counties of Los Angeles (January 1996), Orange (February 1995), Riverside (January 1996), San Bernardino (November 1995), Santa Barbara (April 1996), San Diego (August 1995), and Ventura (August 1995) for the years 1995, 2000, 2010, and extrapolation for the year 2020.

Riverside County. Overall, the County of Riverside has adequate total disposal capacity to the year 2008. A shortage could occur, however, before this date because of the limits on daily permitted capacity. Additional capacity could be realized from the proposed expansions at Badlands, Lamb Canyon, Edom Hill, and El Sobrante Landfills. Although these

expansions, if approved, would provide the County with sufficient overall capacity in the medium term, there is a geographical disparity in landfill capacity (i.e., adequate capacity in the western County of Riverside and inadequate capacity in the eastern County of Riverside). As discussed previously, the Coachella Valley area of the county could experience a shortfall of landfill capacity by the year 2002. The CVAG is evaluating its options for long-term waste disposal, including disposing of waste at the Eagle Mountain Landfill, if this facility is developed.

San Bernardino County. The San Bernardino County Solid Waste Management Department estimates that San Bernardino County has approximately 10 years of disposal capacity available. The countywide average, however, is not a practical guideline because of the distance from the more populated valley area to the remote landfills located in the desert and mountain areas of the county. Although the desert area landfills have approximately 18 years of capacity, the valley landfills, which handle approximately 80 percent of San Bernardino County's waste, have only 6 years of available capacity based on the San Bernardino County Solid Waste Management Department estimates.

San Bernardino County is currently undergoing a countywide planning effort to determine its eventual, solid waste management system, which includes closing many of the smaller landfills, expanding three to seven of the existing landfills, and developing a new landfill in Victor Valley. Most of the proposed projects for increasing capacity have some local

opposition, and San Bernardino County has indicated in its Draft Countywide Siting Element that, if adequate local capacity cannot be developed, waste will be hauled by rail to existing out-of-state landfills or proposed in-state landfills, if they are developed.

Los Angeles County. As noted previously, Los Angeles County could have inadequate landfill capacity by the year 2000 to meet its daily disposal needs because of the likely closure of Azusa, BKK, Bradley, Lopez Canyon, and Spadra Landfills and the potential closure of Antelope Valley, Chiquita Canyon, and Lancaster landfills during the next 5 years. By the year 2010, because of the closure of additional landfills and increased population, the shortage in landfill capacity could reach 25,000 tons per day. By the year 2020, the shortage could exceed 31,000 tons per day, even if all cities meet their AB 939 diversion objectives and Sunshine Canyon Landfill is reopened.

Operators of several landfills are trying to extend or are considering extending their permits for several wars or expanding the capacity of the landfill (i.e., Antelope Valley, Chiquita Canyon, Lancaster, and Puente Hills landfills) to continue operation. Browning-Ferris Industries (BFI) has recently obtained rights from BKK to obtain permits to develop the proposed 190-million-ton Elsmere Canyon Landfill, which will have a daily capacity of 16,500 tons. Development of Elsmere Canyon is problematic because the federal lead agency for the Elsmere Canyon Landfill EIS, the U.S. Forest Service, has circulated a Draft EIS with a preferred alternative of "No Project." Even under the most

favorable of conditions (i.e., if all permits are received to extend or expand operation of existing landfills and if the Elsmere Canyon Landfill is opened), there will still be a shortfall in disposal capacity by the year 2020. Because of the difficulties and high costs associated with siting, permitting, and developing landfills, and the major environmental concerns of siting landfills near major urban areas, it is doubtful that needed disposal capacity to meet Los Angeles County's needs will be obtained through the development of new local landfills.

The Preliminary Draft of the Los Angeles Countywide Siting Element (Element) states "It is recognized that most (or all) of the sites identified may encounter strong opposition during the permitting process and that not all of the sites may be approved. Also, even if a site is successfully permitted, the total approved capacity and daily capacity may be less than projected in the Countywide Siting Element's analysis. Additionally, adequate reserve daily capacity should be provided to handle daily and seasonal variations in waste quantities as well as unanticipated disposal needs."

The Element further states "Jurisdictions throughout Los Angeles County have recognized that in the long term, out of County disposal may be necessary, even if most of the potential disposal capacity identified in the Countywide Siting Element is permitted."

In obtaining the permit to extend operations of Puente Hill Landfill to the year 2003, the County Sanitation Districts of Los Angeles County

committed in their certified EIR (County Sanitation Districts of Los Angeles County, USFS, and Los Angeles County Department of Regional Planning, January 1995) to export up to 4.000 tons of waste per day from Los Angeles County by the year 2005. The City of Los Angeles has also committed to the export of solid waste. In the adopted City of Los Angeles Solid Waste Management Policy Plan, dated April 1993, it is stated that "It is the policy of the City of Los Angeles that the City shall have the ability to transport either by rail or truck a portion of the waste requiring disposal after diversion to remote locations outside the County of Los Angeles, provided such disposal is environmentally safe, technically feasible, and publicly acceptable."

Orange County. With the opening of the Frank R. Bowerman Landfill (formerly Bee Canyon Landfill) in 1990, Orange County has adequate capacity to meet medium-term needs. By the year 2025, however, when the Frank R. Bowerman Landfill is expected to close, Orange County will have insufficient permitted available capacity to dispose of approximately 8,000 tons of waste a day. Orange County is currently not pursuing any options for developing additional landfill capacity and now allows the importation of out-of-county waste to generate additional funds because of the recent bankruptcy. This import of waste could slightly alleviate the disposal capacity shortfalls in some neighboring counties but will result in a shortfall in available disposal capacity to meet the needs of cities in Orange County before the year 2025. Without importing waste, adequate local disposal capacity

exists to meet Orange County's needs to the year 2020.

Santa Barbara County. As described previously, the County of Santa Barbara will have a shortfall in permitted daily disposal capacity of approximately 600 tons per day by the year 2000. Santa Barbara County is currently in the process of permitting the Phase I expansion of Tajiguas Landfill. Three other phases of expansion are planned. If all four phases of expansion of the Tajiguas landfill occur, Santa Barbara County will have sufficient landfill capacity to meet its medium-term and long-term needs. If additional capacity cannot be obtained, Santa Barbara County would be required to transport its waste to out-of-county disposal facilities as no other options are being pursued.

San Diego County. The County of San Diego will experience a shortfall in disposal capacity of approximately 2,000 tons per day by the year 2005, based on existing permitted capacity. By the year 2025, the shortfall will be approximately 10,000 tons per day. The City of San Diego is currently evaluating three sites for the potential of developing a landfill that could dispose of up to 4,800 tons per day for at least 25 years. If environmental review, land use approval, and permitting are completed by the year 2000, the preferred site would begin operations by the year 2005. The County of San Diego has identified potential sites for the development of one landfill in the north county area and one landfill in the south county area. The tentative schedule is to begin detail planning for the development of the

north county landfill in the year 2007 and the south county landfill in the year 2009. To meet the County's projected year 2020 disposal requirements, the permitting and development of the proposed City of San Diego landfill and at least one landfill in either the north or south county areas will be required. If these two landfills cannot be permitted and constructed, San Diego County would be required to use out-of-county disposal facilities for at least a portion of its waste.

Ventura County. Most of the County of Ventura's waste is currently disposed of in the Simi Valley Landfill and the Bailard Landfill in Oxnard. The Simi Valley Landfill's conditional use permit (CUP) expires in 2004, and the Bailard Landfill is expected to reach capacity in 1996. The only landfill with existing permitted capacity available for local disposal after the year 2004 is the Toland Road Landfill, which currently can accommodate less than 5 percent of Ventura County's waste. Ventura County is in the process of preparing an EIR to increase the capacity of the Toland Road Landfill. Because of the failure to site the Weldon Canyon Landfill, Ventura County is reviewing export of waste to out-of-county sites in addition to reviewing proposals by private vendors to expand existing landfills or develop new in-county landfills to meet its disposal needs.

Summary of Medium-term Disposal Capacity Requirements. With the exception of the County of Orange, there is inadequate existing disposal capacity to meet each of the counties' medium-term needs. As indicated in Figure 1-4, the shortage in disposal capacity in the Region could reach 48,000

tons per day by the year 2020. Some of the needed increase in disposal capacity could result from repermitting and expanding the capacity of existing landfills. For the majority of these landfills, this will extend their life by 10 or fewer years. Even if all proposed repermitting or expansions of existing landfills were approved, which is unlikely, there still will be a shortage in the seven-county region in disposal capacity of over 20,000 tons per day by the year 2020.

Another option for obtaining additional disposal capacity is siting, developing, and permitting new local landfills. Several counties are considering developing new local disposal capacity. Only one site located in Los Angeles County (Eismere Canyon), however, has initiated an extensive environmental review process. Even if this landfill is developed, Eismere Canyon would only partially solve Los Angeles County's disposal requirements; and a shortfall in disposal capacity would still occur in Los Angeles County before the year 2020. With the exception of new landfills in San Diego County, the other new landfills being considered will service only small outlying urban and rural areas.

The only other waste disposal option for most of the counties (even after recycling, source reduction, and other waste diversion) is transporting waste by rail to remote disposal facilities. As discussed in Section 1.3.2.3, there are several out-of-state landfills that currently exist and two in-state Southern California landfills in addition to Eagle Mountain currently in the permitting stage that have the capabilities to accept waste by rail.

Long-term Disposal Capacity Requirements. Over the long term (1995 to 2050), approximately 1.3 billion tons of waste will require disposal from the seven-county Region. This estimate assumes that all cities and unincorporated areas achieve a 50 percent diversion by the year 2000. By the year 2050, the total daily disposal needs of the Region could reach 105,000 tons, which is equivalent to the daily disposal capacity limits of five to six developments the size of the proposed Eagle Mountain Landfill. Waste requiring disposal from the seven-county Region could be reduced if communities achieve greater diversion rates than what is currently mandated by the state. Existing local permitted capacity and additional local permitted capacity options currently being pursued by counties in the seven-county Region will accommodate only a small portion of the Southern California region's long-term disposal needs.

1.3.1.3 Remote Disposal Capacity

In addition to the proposed Eagle Mountain Landfill, there are two other remote landfills in Southern California currently in the process of obtaining the necessary approvals to accept waste. These two proposed landfills are the Rail Cycle-Bolo Station Landfill and the Mesquite Regional Landfill. Rail Cycle proposes to develop a waste-by-rail system at the proposed Bolo Station Landfill, located in eastern San Bernardino County, which would also accept up to 21,000 tons per day of solid waste for the next 60 to 100 years. The proposed Mesquite Regional Landfill, which is located in Eastern Imperial County, would also accept waste by rail

from other Southern California counties. The Mesquite Landfill would have the capacity to accept up to 20,000 tons a day for the next 100 years. These proposed landfills are discussed in more detail in Section 2.8.3.

In addition to the three proposed remote landfills in Southern California (Eagle Mountain, Bolo Station, and Mesquite Landfills), there are several out-of-state regional landfills in the western United States. These include La Paz County Landfill in Parker, Arizona; Butterfield Station Landfill in Phoenix, Arizona; East Carbon Canyon Landfill in eastern Utah; Columbia Ridge Landfill in Arlington, Oregon; and Roosevelt Landfill in the State of Washington. Most of these landfills have large capacities and would be willing to accept waste from Southern California. Although these out-of-state landfills could provide short-term solutions to communities that have no immediate alternative, it is uncertain that they will provide a dependable long-term solution to the Region's disposal needs for the following reasons:

- Although these landfills have the capability to service large areas including most of the western and central United States, the cost of transporting waste to out-of-state landfills increases proportionately with the distance from the source of the waste.

- Many jurisdictions, in Southern California, including CSDLAC, have indicated the desire to haul to sites in the state.

- Some of the out-of-state disposal facilities (i.e., La Paz and Butterfield) currently do not have direct-rail access.

- Federal laws and regulations are continuously in flux: future new regulations and/or amendments to existing laws could affect long-term accessibility to out-of-state sites.

- Many of the out-of-state facilities have not undergone the extensive environmental reviews that are required for landfills in the State of California. Disposing of waste in these facilities might not be politically or environmentally acceptable.

- Special export fees are being considered by the State of California to offset the loss of disposal fees needed by the state to monitor solid waste regulatory compliance and fund waste reduction efforts, which could further increase the cost of remote rail-haul disposal.

In the short term, at least, one rail-haul landfill facility will be needed to ensure that adequate alternative disposal sites are available for those jurisdictions in the Region that could encounter a shortfall in disposal capacity during the next 5 years. For the following reasons, more than one site could be developed to: (1) ensure competitive disposal pricing, (2) provide redundancy in the instance that one facility must prematurely or temporarily close, (3) provide excess disposal capacity to ensure adequate capacity in the event of natural disasters and other emergencies resulting in the creation of

additional demand for disposal capacity, and (4) ensure competition by more than one rail line and to facilitate competitive pricing for waste transport. In addition, if a cost-effective remote disposal option were available, some jurisdictions could choose to use these landfills to conserve local landfill capacity or close existing landfills that are either costly to operate or are in noncompliance with environmental regulations.

By the year 2020, two or three rail-haul disposal facilities could be required, each with a disposal capacity of up to 20,000 tons per day of waste, to meet projected disposal requirements. In addition to these additional facilities, other rail haul facilities could be required for the long term unless new disposal technologies are developed for the environmentally safe and cost-effective disposal of waste and/or significant decreases in per capita generation of waste.

The Project applicant, MRC has had discussion with various private companies about transporting waste from any of the seven counties who have expressed potential interest to use the Eagle Mountain Landfill under a long-term contract arrangement. In addition, MRC has had discussions with various Southern California cities, counties, and sanitation districts concerning long-term commitment of solid waste flow to the site. These discussions have included the County of Riverside Waste Resources Management District, Los Angeles County Sanitation Districts, the City of Los Angeles, San Diego County, San Bernardino County, and Ventura County. MRC and Kaiser have also had

discussions regarding selling a portion of the landfill, by way of equity or air space, to both private companies and government entities. In the future, these discussions could result in one or more agreements for commitment of waste, selling of equity, operating, or selling of air space to occur.